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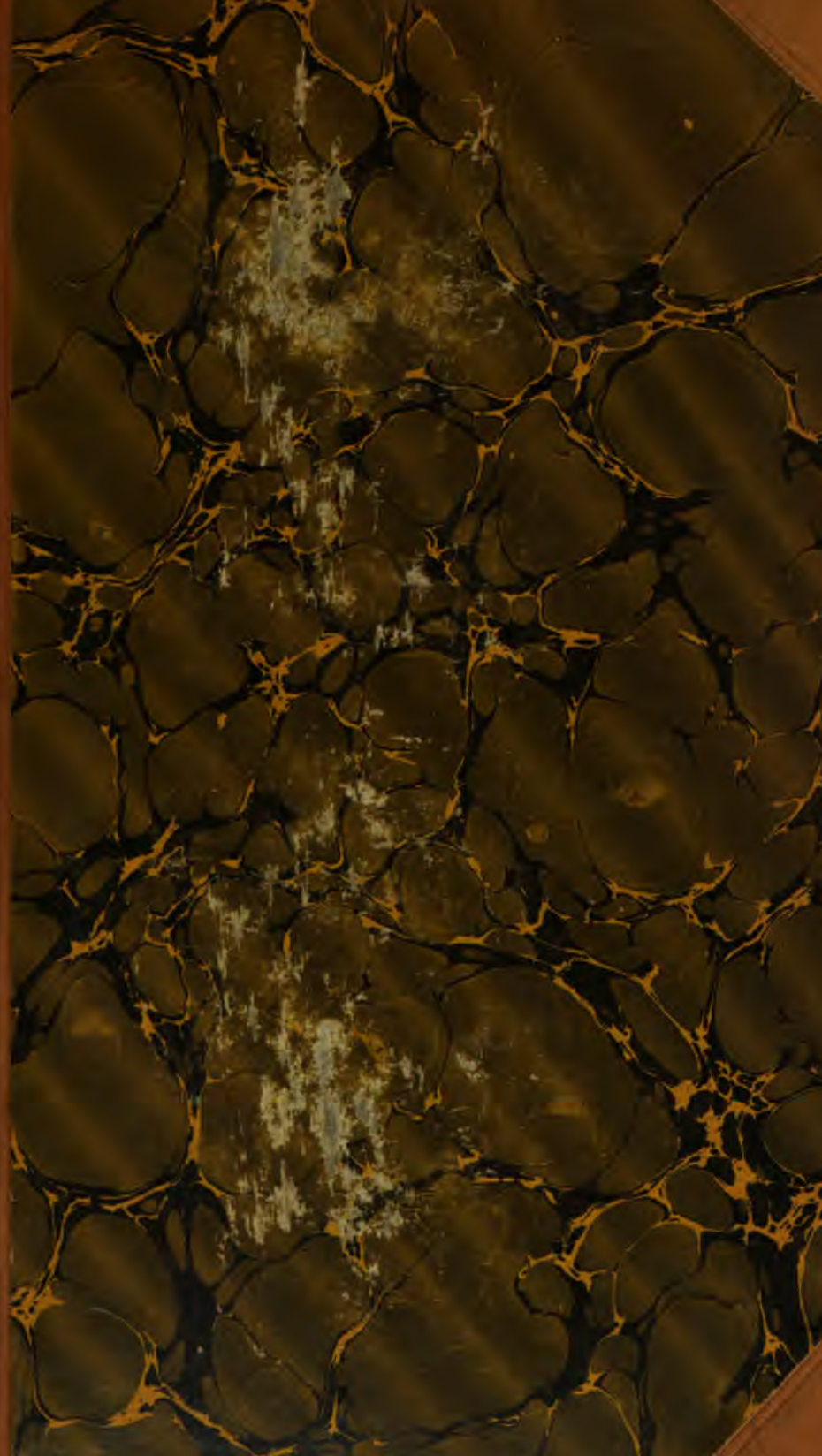
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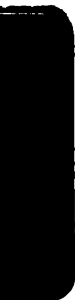
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REPORTS OF CASES
DECIDED IN THE
COURT OF APPEAL,
DURING THE YEAR 1895.

1157.

REPORTED UNDER THE AUTHORITY OF
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OF THE
COURT OF APPEAL
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ERRATA.

Page 139, line 7, for "plaintiffs" read "defendants."

Page 278, line 1, for "plaintiff" read "defendants."

ONTARIO APPEAL REPORTS.

THE COMMISSIONERS FOR THE QUEEN VICTORIA NIAGARA FALLS PARK v. COLT.

*Improvements under Mistake of Title—Compensation—Occupation Rent—
Crown—R. S. O. ch. 100, sec. 30.*

The defendants, owners of land adjoining the bank of the Niagara River, built at great expense stairways and elevators and made paths from the top of the bank to the water's edge of the river to enable visitors to descend to see the view and large sums were received for the use of these facilities. Expensive repairs to the stairways, elevators and paths were from time to time necessary, owing to their exposed position, and the defendants knew that they had no title to the bank, which was vested in the Crown:—

Held, that works of this kind were not lasting improvements within the meaning of section 30 of R. S. O. ch. 100, and that both on this ground and on the ground that they knew they had no title the defendants could not recover compensation.

Seemle: The section would not affect the Crown and the title being in the Crown when the improvements were made the Crown's grantee would take the land free from any lien.

In cases coming within the section the amount by which the value of the land has been enhanced is to be allowed and the cost or value of the improvements is not the test:—

Held, also, that the defendants were not chargeable with the profits made by them but only with a fair occupation rent for the land.

Judgment of STREET, J., varied.

THIS was an appeal by the defendants from the judgment of STREET, J.

The action was brought on the 15th of February, 1888, to recover possession of land described in the statement of claim as "the premises lying along the bank of the Niagara river, known as that part of the chain reserve on the bank of the river Niagara, in front of the broken front of lot number 74, in the township of Stamford, in the county of Welland, and Province of Ontario, and of the face of the cliff down to the water in front thereof, with the

Statement. appurtenances." The plaintiffs asked \$250 as mesne profits, and claimed title under an order made on the 15th of July, 1887, by the Lieutenant-Governor of Ontario in Council, under the provisions of "The Queen Victoria Niagara Falls Park Act, 1887."

The defendants limited their defence to that part of the property described as "the face of the cliff down to the water's edge of the river Niagara," and as to this denied the plaintiffs' title, and claimed title themselves by agreement to purchase from the Government of Canada. In the alternative they claimed compensation for improvements made by them, thus described in the statement of defence:—

"The said frontage of said lot abuts upon and overlooks that part of the Niagara river known as "The Whirlpool," and has within the past few years become a largely frequented resort for persons visiting Niagara Falls and its vicinity, and for other travellers.

"The defendants have made numerous permanent and costly improvements upon the said river frontage, including the laying out of walks and paths along the cliff overlooking the river in and to places formerly inaccessible, and the maintaining of the same in a state of repair, and including also the construction of an elevator and building in connection therewith, for the carriage of persons visiting the resort, from the top of the bank to its foot.

"The defendants have expended in connection with the said improvements, exclusive of their own time and labour in connection therewith, not less a sum than \$15,000."

The defendants were the owners of other lands near the part of the cliff in question and the purchase of the land in question by them from the Government of Canada had not been carried out, they having afterwards learned that the title was in the Province.

The action was tried at Toronto, on the 11th of May, 1889, before ROSE, J., who gave judgment in the plaintiffs' favour. The judgment as entered directed that an account

should be taken of the rents and profits of the lands described from the 15th of February, 1888, to the day of recovering possession, and contained the following provision as to compensation for improvements :— Statement.

“ The defendants are entitled to compensation for the improvements made under the statute, and it is referred to Edward Morgan, Esquire, to fix the amount to be allowed to the defendants for such improvements made by them, or either of them, upon the lands above described.”

Evidence was taken before the referee, who allowed the plaintiffs as rents and profits, from the 15th of February, 1888, the sum of \$922, being five per centum per annum upon \$8,000, the value of the lands with the improvements, and the defendants, as compensation for improvements, the sum of \$8,000, with interest at six per centum per annum, from the 15th of February, 1888.

In his report, he made the following special finding :—

“ I have also been asked to find specially as to the condition and state of repair of the improvements on the premises and the value thereof on the 3rd day of July, 1890, the date when the evidence on my enquiry was taken.

“ There was evidence before me on these points, and I find that between the date of the issue of the writ herein and the 3rd day of July, 1890, the various structures, improvements and works done by the defendants on the land in question were seriously injured and dilapidated by the action of the weather and land slides and were not at the last mentioned date in a condition of repair and efficiency for the purposes for which they were constructed, and I further find that from such evidence as was given, it would appear that an expenditure of between \$1,500 and \$2,000 would be required to put them in the state of repair and efficiency which existed at the time of the issue of the writ in this action.”

The plaintiffs appealed from this report, and STREET, J., set it aside, holding that there should be set off against the improvements, the profits made by the defendants,

Statement. both prior and subsequent to the 15th of February, 1888, out of the improvements in question, in addition to an occupation rent based upon the unimproved value of the land. He also held that the value placed by the referee upon the improvements was too great, and in the result found a balance against the defendants of \$4,624. He held further, however, that the defendants were entitled to an allowance for managing the property, and that this allowance should be set off against the debit balance on the other account, and came to the conclusion "that it should be declared that neither party has any claim against the other in respect of the matters referred."

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 21st and 24th of September, 1894.

Osler, Q.C., and K. H. Cameron, for the appellants. The findings of the referee were fully supported by the evidence, and should not have been disturbed. The peculiar nature of the property must be kept in mind, and it is not reasonable to charge the defendants with profits. The property, if unimproved, would have been worthless, and all the revenue has been obtained out of the theretofore worthless property by the money and skill of the dispossessed occupants. The judgment limits the time from which, and modes in which, the account of rents and profits is to be taken, and its provisions must be observed.

Moss, Q.C., and W. Barwick, for the respondents. The works in question are not improvements at all within the meaning of the Act. They are simply temporary structures that must be repaired from year to year at great expense, and they do not in any way enhance the value of the land. Enhancement of value is the test, and these works are valuable and useful only as accessories to a business carried on on adjoining premises. These were artificial and arbitrary erections to suit the special needs of the defendants, and do not in any way add to the value of the

land for ordinary purposes : Sedgwick and Wait on Title to Land, 2nd ed., sec. 699 ; *Noble v. Biddle*, 81 Pa. St. 430 ; *Breit v. Yeaton*, 101 Ill. 242 ; *Stark v. Starr*, 1 Sawyer 15 ; *Morris v. Tinker*, 60 Ga. 466. Argument.

[MACLENNAN, J. A.—Is there any lien for improvements as against the Crown ?]

No ; and that is another answer to the claim. Moreover, the defendants knew they had no title to this land when they made these alleged improvements, for at that very time they were negotiating with the Dominion Government for its purchase. Assuming, however, that the defendants are entitled to compensation for improvements, they are properly chargeable with the profits. As soon as compensation is claimed, the corresponding equity arises to reduce that claim by the income received. The plaintiffs are not, on this branch of the account, concluded by the writ or by the judgment. The rights are correlative. Rent must be allowed from the time the first improvements that are claimed for were made. Otherwise the wrongful occupant would get his improvements, and live rent free as well. The cases are collected and considered in *Munsie v. Lindsay*, 11 O. R. 520.

Osler, Q. C., in reply. It is too late now to object that the improvements in question are not within the Act. The judgment settles that. It is also too late to object that the Crown is not bound by the Act, but the objection, even if open, is of no avail. This is not a personal claim against the Crown, but merely a lien or burden which the Crown, as well as any other person, must assume when endeavouring to dispossess an innocent holder. The statute is merely a recognition of an equitable doctrine binding Crown and subject alike.

January 15th, 1895. BURTON, J. A. :—

There can be no question that the statute referred to in the judgment does not affect the Crown. The only question is whether it is open to the respondents now to raise

Judgment.**BURTON,
J.A.**

the point, no objection having been taken at the hearing or before the referee. In my view of the case, however, it is not necessary to consider that point, as the appellants must, I think, fail upon other grounds. The words of the statute are: "In every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements."

The appellants had, therefore, to establish three things:—

1. That the alleged improvements were lasting improvements.

2. That they made them under the belief that the land was their own.

3. That the value of the land had been enhanced by such improvements.

It is clear that the great bulk of the improvements made in 1876, could hardly come under the head of lasting improvements, but that they have from time to time been swept away and, to a very great extent, rebuilt or replaced by others; but, waiving that, it seems to me that there is the insuperable objection in the appellants' way, that, by their own admission, they became aware so far back as that year, that the Government under whom they claimed had no title to the land.

This would be sufficient to dispose of the case, but I see nothing in the shape of evidence to establish that the land itself is enhanced in value in the plaintiffs' hands by these improvements.

Upon this short ground, therefore, I think we must hold that the appellants have failed to establish any claim under the statute, and that the learned Judge should have simply set aside the award of the referee on these grounds.

OSLER, J. A. :—

The form of the judgment at the trial causes some little difficulty in understanding exactly what is open to either party. There can be no inquiry into the plaintiffs' title.

The question is, what was decided in regard to the right to compensation for improvements.

Judgment.

OSLER,
J.A.

"The defendants," it runs, "are entitled to compensation for the improvements made under the statute, and it is referred to Edward Morgan, Esquire, to fix the amount to be allowed to the defendants for such improvements made by them, or either of them, upon the lands."

It was contended that this covered all improvements shewn to have been made up to the date of commencement of the action, and that there was nothing to be done but to ascertain what allowance should be made in respect of these under the statute, taking the account of rents and profits with reference to the improvements so made. On the other hand, it was said, that it was the duty of the referee to ascertain whether the improvements were, in fact, such as were, within the words of the statute, "lasting improvements" made by defendants on the land, under the belief that the land was their own, and that the question, whether any particular improvement which the defendants claimed for had been really so made, was a matter open to be inquired into, and had not been, as to that point, adjudicated upon.

In giving judgment, Rose, J., said: "I think there must be a reference as to the improvements, such as are shewn to have been made in the words of the statute, and not being able to find the period within which they have been made, I will leave that at large to be determined by the referee under the order of reference." On the whole, I am of opinion, that as regards the character of the improvements, whether they were such and so made as to be within the statute, the question was open and the objection was taken during the reference. But whether the Act, R. S. O. ch. 100, sec. 30, would apply to these plaintiffs as representing in any sense the Crown, and therefore not bound by or subject to the Act; or whether the Act applies to a case where improvements were made while the land was in the Crown and before it was vested in the plaintiffs by the order in Council of the 15th July, 1887, under

Judgment.

OSLER,
J A

50 Vict. ch. 13, sec. 5, (O.) are, I think, questions concluded by the judgment, or at all events not open upon this inquiry, save in so far as they bear upon the point, whether the improvements were made by defendants under the belief that the land was their own.

Upon a full consideration of the case, I find myself, with all respect, unable to agree with the mode in which either the referee or the learned Judge below has dealt with the case. Passing over for the present the question whether the defendants can be said to have made the improvements under the belief that the land was their own, the language of the Act is: "In every case in which a person makes lasting improvements on land, * * he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements."

It is this last requisite which in all cases of this kind is to be kept in view. It is not the cost or value of the improvements, but the increase in the value of the land by reason thereof which is to be considered, and which alone gives the defendant a right to a lien upon the land. Merely temporary or wasting improvements, however expensive or valuable they may have been in themselves or productive while they lasted, from the situation of the land or other causes, of an immediate revenue producing power, are not in contemplation of the Act. They must be lasting improvements. It is only the value of the land as enhanced by improvements, for which the maker of them is given a lien. The case at bar as regards the land on which the improvements were made, the nature of the improvements themselves, and the manner in which they are used and made available, is peculiar. The land, a part of the cliff or bank at a point on the river Niagara, was a piece of rough, bare, sloping, irregular rock; the improvements, such as to require every year, from the constant action of ice and storm, costly and extensive repairs, in order to be of any use to their possessor, and available only to any one who, like the

defendants, was the owner of other land on which the approaches and buildings used in connection with them were erected. It is difficult to compare improvements of this character—the subject of rapid and constant waste and of which the value, even when maintained in the highest degree of repair, is largely dependent upon their connection with other property—with improvements made upon farm lands by clearing and bringing them into cultivation and erecting farm buildings thereon, or with those made on city property by the erection of valuable shops or dwelling-houses. The defendants' improvements, now in question, disregarding those of an earlier date, which had practically disappeared, were, I think, properly treated by Street, J., as having been made in the year 1886. I do not think he was wrong in putting their cost at about \$6,000, instead of the larger sum found by the referee. In the following four years there was an expenditure thereon for repairs of \$1,500, which, though made after action brought, has been allowed to the defendants in account, and notwithstanding which, a further expenditure of \$1,500 was necessary when the defendants gave up possession on the 2nd of July, 1890, in order "to restore the improvements to a proper working condition." This latter sum has been allowed against the defendants in the account as and for "deteriorations." In my opinion, it cannot properly be held, that improvements of such a character, throwing such an onerous and continuous charge upon the true owner of the land to maintain them, are lasting improvements within the meaning of the Act. But even if they are to be so regarded, it is, to my mind, evident that the case has been treated more from the point of view of the cost of the improvements themselves than from that of the statute, namely, by how much they have enhanced the value of the particular parcel of land on which they were made, having regard to their wasting deteriorating character and to the dominating consideration, that the ownership of the land is now detached from the ownership of the other land in connec-

Judgment.

OSCAR,
J.A.

Judgment. tion with which they have hitherto been used and made-
Overseer, available. Judging from the condition in which these
J.A. improvements were said to have been at the time of the
reference (July, 1890), the date when the defendants abandoned possession, and having regard to the other circumstances I have mentioned, it appears to me that it would be extremely difficult to say that the value of the land was at all enhanced by them, nor is there any evidence as to what any one would give for it in its then condition as distinguished from what it would fetch in a state of nature.

The date of the commencement of the action is, it appears to me, the time indicated by the Act as that at which the enhanced value of the land and the lasting character of the improvements are to be enquired into, and if the latter are such as to become ruinous while the defendant is contesting the action, except at an enormous expenditure for repair, it only shews that they cannot be of the lasting character which alone enhances the value of the land.

A further and even greater difficulty in the way of the defendants and one which goes to the very root of their claim, is that they do not bring themselves within the other essential condition of the Act, namely, of having made the improvements under the belief that the land was their own. I say nothing as to the fact that the land was then in the Crown or as to the objection that the Act does not entitle any one to set up a claim for improvements against the Crown or against any one who claims as grantee of the Crown after the improvements were made. It is enough to ask whether upon the evidence it is possible to hold that the defendants believed that the land was their own, a question which was necessarily open upon the reference. No doubt, they were endeavouring to buy it, and very many years ago they supposed they had made an agreement with the Dominion Government as the owners for the purchase of it. But long afterwards, when it appeared that the property was the property of the Pro-

vince, and the defendants knew that it was with the Provincial Government they would have to deal, they applied to that Government for a patent. This was in the year 1884, two years before the improvements now in question were made, and according to the defendant Leander Colt's evidence, he was then told by the late Commissioner of Crown Lands, Mr. T. B. Pardee, that if the commissioners, *i. e.*, the now plaintiffs, did not require the land, the defendants should have a deed of it. If after such an intimation they chose to remain in possession and make a large expenditure upon the land without obtaining a patent, they did so, in my opinion, at their own risk, but they cannot now be heard to assert that they did so under the belief that the land was their own. As it has turned out, they seem to have been well advised in the course they took, for though the land was not their own, its possession has been extremely profitable to them, and with that, I think they must be satisfied.

Judgment.

OSLER,
J.A.

There remains only to consider the question of the charge by the plaintiffs for rents and profits of the land. This is a claim which seems to have been seriously pressed only as against the claim for compensation. I agree rather with the referee, who arrived at the charge to be made in respect of rents and profits by a percentage upon the amount of the improved value as he found it, than with my brother Street, who simply charged them with the whole of the revenue derived from the improvements, or rather with the whole of the net profits derived from them. I think that all that is properly charged against the occupant under such circumstances is a proper occupation rent for the property. I have not found any case in which he has been charged with the net income he has made out of it, and therefore I think that the charge of \$4,624 found against the defendants as the balance due on taking the account, as the learned Judge has taken it, is wrong. The enquiry on this head, however, was unnecessary, except as incidental to the claim for improvements, and the plaintiffs will probably be satisfied to have awarded to them the

Judgment. amount claimed in their writ and statement of claim for mesne profits, viz., \$250. The appeal, in my opinion, must be in part allowed; but under all the circumstances, I think it should be allowed without costs. Nor do I think there should be any costs of the reference to either party.

OSLER,
J.A.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

Appeal allowed in part without costs.

RAY ET AL. V. ISBISTER ET AL.

Partnership—Bills of Exchange and Promissory Notes—Endorser—Res Judicata—Practice—Judgment against Firm—Action thereon against Alleged Partner.

An action was brought against a firm in the firm name as makers and an individual as endorser of a note, and was dismissed as against the endorser on the ground that he had endorsed at the request of the holders for their accommodation, judgment being given against the firm:—

Held, reversing the judgment of STREET, J., 24 O. R. 497, that the dismissal of this action was an answer to an action on the judgment, in which it was sought to prove that the endorser was, as regards the plaintiffs, a partner by estoppel and therefore bound by the judgment against the firm.

The practice to be followed in proceeding against an alleged partner on a judgment against the firm, considered.

Statement. THIS was an appeal by the defendant James Isbister from the judgment of STREET, J., reported 24 O. R. 497.

The plaintiffs brought the action against Malcolm Isbister and James Isbister, claiming a declaration that they were partners in the firm of M. Isbister & Co., and jointly and severally liable on a judgment recovered by the plaintiffs against that firm and on several promissory notes. James Isbister denied that he was a partner in the firm or liable to the plaintiffs as a partner, and alleged that in any event the plaintiffs had elected to treat Malcolm Isbister alone as their debtor. He also alleged that upon one of the notes in question, made by the firm of M. Isbister & Co.,

he had been sued as endorser, and had escaped liability by shewing that he was merely an accommodation endorser for the plaintiffs, and he pleaded the judgment in that action as a bar. Statement.

The action was tried at Port Arthur on the 7th of November, 1893, before STREET, J., who, on the 4th of January, 1894, gave judgment in favour of the plaintiffs, holding that James Isbister, though not a partner, had held himself out as a partner, and overruling the special defences.

James Isbister appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 31st of May, 1894.

Osler, Q.C., for the appellant. The form of the action is wrong. The plaintiffs should have obtained judgment against the firm, and then have proceeded against the alleged partner under that judgment under Consol. Rule 317. In the former action it has been held that the appellant was merely accommodation endorser for the plaintiffs. How then can he be liable as a partner? The former judgment is conclusive on this point: *Brunsdon v. Humphrey*, 11 Q. B. D. 712; *Butler v. Butler*, [1894] P. 24; *Conradi v. Conradi*, L. R. 1 P. & D. 514; *Gillies v. How*, 19 Gr. 32. [The learned counsel also discussed the evidence at length, contending that an election to treat Malcolm Isbister as sole debtor was made out.]

Aylesworth, Q.C., for the respondents. The action is properly framed: *Clark v. Cullen*, 9 Q. B. D. 355. The former judgment is no bar. The questions in issue are entirely different, and there is no inconsistency in making the appellant liable in this action as a partner by "holding out" and letting him escape in the former action as an accommodation endorser. The liability as partner and the liability as endorser are quite distinct things, and it is only when exactly the same point is in issue between the same parties

Argument. that the doctrine of estoppel by *res judicata* arises: Taylor on Evidence, 8th ed., secs. 1699, 1711; *Guest v. Warren*, 9 Exch. 379. There was no election to treat Malcolm Isbister as sole debtor, and nothing was done by which the position of the appellant was altered or affected. Osler, Q.C., in reply.

January 15th, 1895. The judgment of the Court was delivered by

OSLER, J. A. :—

As regards the claim against the appellant James Isbister upon the judgment against M. Isbister & Co., in the former action, the question is whether he is bound by that judgment as having been a member of that firm when the note therein sued on was made. The only ground on which he has now been held to have been a partner is that he had held himself out as such to the plaintiffs, not that he was in truth and in fact a member of the firm. The pleadings and proceedings and evidence in that action are before us.

It appears therefrom that the action was brought against M. Isbister & Co., as makers, and James Isbister, as endorser of the note sued on; that judgment was signed—being the judgment in question—against M. Isbister & Co. on default of appearance, and that James Isbister defended the action, which, as against him, was dismissed at the trial. His defence as pleaded was that the firm of M. Isbister & Co. consisted of two persons, Malcolm and Adam Isbister, who were indebted to the plaintiff before and at the time of the making of the note to the amount of \$30,000 or thereabout, for which they held no security except the notes of M. Isbister & Co., and some policies of insurance on stock. That M. Isbister & Co., and the plaintiffs, procured the endorsement of the defendant James Isbister of the note in question for the accommodation of the plaintiffs, in order that the latter might not

appear, in the event of the banks with which they were dealing making enquiry on the subject, to have as portion of their assets so large an amount of direct liability on the part of M. Isbister & Co. as their indebtedness to the plaintiffs then amounted to; that the plaintiffs directed M. Isbister & Co. to inform James Isbister, as they in fact did, that in the event of his endorsing the note for the purpose aforesaid he should incur no liability whatever thereon; that he accordingly endorsed the note at the request of the plaintiffs and M. Isbister & Co. for the purpose, and upon the representation aforesaid, and solely for the accommodation of the plaintiffs, and on their undertaking that he should incur no liability upon the note, and not otherwise, and that he never received any consideration for his endorsement from the plaintiffs, or from M. Isbister & Co.

Judgment.

OSLER,
J.A.

Now, it appears to me, even if we lay out of consideration altogether the fact that on the trial of the case against James Isbister the plaintiffs disclaimed that the action had been brought against him in his capacity of partner of M. Isbister & Co., or that that firm consisted of any other partners than Malcolm and Adam Isbister, that the defence set up and proved by James Isbister precludes the plaintiffs from asserting that as to them there was in respect of the note in question any such holding out by James Isbister that he was partner in the firm as to amount to an equitable estoppel. The whole transaction between the plaintiffs and M. Isbister & Co. and the defendant proceeded on the assumption that the latter was not a partner in that firm, or liable at all upon the note. Had he really been a partner it would no doubt have been different, but as that is admittedly not the case I fail to see how the plaintiffs, taking the note in the way they did, can assert that there was any holding out, or that they were in any way misled by the defendant into dealing with Isbister & Co., in the belief that the defendant was a partner.

I think, therefore, that so far as the action on this judgment is concerned, the plaintiffs must fail.

Judgment.

OSLER,
J.A.

I should have thought that such an action as this, *i. e.*, an action on the judgment, could not properly be brought in order to fix with liability as a member of a firm against whom the judgment had been recovered a person who had neither admitted in the pleadings that he was nor had been adjudged to be a partner, or who had not been served with the writ of summons as being a partner and had failed to appear. The Consolidated Rule seems to me to contemplate and provide for a special proceeding appropriate to such a case. The case of *Clark v. Cullen*, 9 Q. B. D. 355, however, is in favour of the plaintiffs' right to proceed by action on the judgment and to try therein the question whether the defendant was a member of the firm so as to be bound by the judgment.

The Rules, moreover, as to suing and taking judgment against partners as a firm are inappropriate to a case in which the plaintiff seeks afterwards to obtain execution on the judgment against a person whom, as in this case, he has not served as partner with the writ, and whom he can only treat as being partner by estoppel. *Ex hypothesi* he supposed him, when he brought his action, to have been a partner, and should have served him as such, if at least the true state of facts had then been known to him. The mere recovery of judgment by a defendant sued as endorser of the firm's paper could not preclude the plaintiff from afterwards suing the defendant as one of the partners makers of the note. See *Wegg Prosser v. Evans*, [1894] 2 Q. B. 101; [1895] 1 Q. B. 108.

I may add that as regards the other causes of action sued on, it appears to me that the judgment is right. They consist of notes and a small balance due upon a banking account made and incurred subsequent to the making of the note on which judgment was recovered. They stand on a wholly different position from that note, and are quite unaffected by the circumstances which constitute a defence to it. The finding, therefore, that as to them the defendant was held out as and was therefore a member of the makers' firm may well stand.

The only remaining defence pleaded to the whole action substantially is, that the plaintiff had elected to treat Malcolm Isbister alone as their debtor, as representing or constituting the firm of M. Isbister & Co. As to this I think it sufficient to say that on the evidence before us I agree with the learned trial Judge in thinking that this defence was not proved.

Judgment.

OSLER,
J.A.

The appeal will therefore be allowed, and the judgment below reduced by the sum allowed in respect of the note referred to, and the appeal dismissed as to the residue. Success being divided, I think the proper way to dispose of the costs will be to make no order.

Appeal allowed in part without costs.

IN RE MACLAREN.

Probate—Ancillary Probate—Will—Surrogate Court—51 Vict. ch. 9 (O.).

A will executed by a person when domiciled in the Province of Quebec before two notaries there, in accordance with the law of that Province, not acted upon or proved in any way before any Court there, is not within the Act respecting Ancillary Probates and Letters of Administration, 51 Vict. ch. 9 (O.).

Judgment of the Surrogate Court of Bruce affirmed.

Statement. THIS was an appeal from the judgment of His Honour Judge Barrett, Judge of the Surrogate Court of the county of Bruce, and the question involved was the construction of section 1 of the Act respecting Ancillary Probates and Letters of Administration, 51 Vict. ch. 9 (O.).

This section provides that where any probate or letters of administration, or other legal document purporting to be of the same nature, granted by a Court of competent jurisdiction in the United Kingdom, or in any Province or territory of the Dominion, or in any other British Province, is produced to, and a copy thereof deposited with, the registrar of any Surrogate Court of this Province, and the prescribed fees are paid as on a grant of probate or administration, the probate, or letters of administration or other document aforesaid, shall, under the direction of the judge, be sealed with the seal of the Surrogate Court, and shall thereupon be of the like force and effect in Ontario, as respects personal estate only, as if the same had been originally granted by the said Surrogate Court of this Province, and shall (so far as regards this Province) be subject to any orders of the last mentioned Court, or on appeal therefrom, as if the probate or letters of administration had been granted thereby.

David MacLaren, while domiciled and resident in the Province of Quebec, made a will pursuant to the provisions of Articles 843 *et seq.* of the Civil Code of Quebec, before two notaries public. By the law of Quebec no letters probate of such a will are required to be issued, and notarial copies are sufficient authentication.

After making the will Maclaren removed to this Province, and died while domiciled and resident in the county of Bruce, being at the time of his death possessed of personal estate in that county. The executor named in the will made an application in the Surrogate Court of the county of Bruce for the issue of ancillary letters probate, and in support of the application the usual executor's affidavit to duly administer the estate was filed, together with a notarial copy of the will and an affidavit proving the law of the Province of Quebec, the fact of death, and the nature of the assets in respect of which the issue of ancillary letters probate was desired.

The learned Judge refused the application, holding that a will of this kind did not come within the Act.

The executor appealed, and the appeal was argued before OSLER, J. A., in Chambers, on the 7th of January, 1895.

W. E. Middleton, for the appellant.

On the same day the following judgment was delivered :

OSLER, J. A. :—

I think that the Surrogate Judge was right in not granting ancillary probate of the will of the testator under 51 Vict. ch. 9, sec. 1 (O.).

The document in respect of which the Judge of the Surrogate Court has been asked to act under the above provision is a copy of a will of the testator executed before two notaries in Quebec, under the provision of the Civil Code. There would seem to be several modes of making wills in the Lower Province. There are holograph wills, and wills made in the form derived from English law, and these must, by Article 857, be presented for probate to the prescribed Court. There are also wills made, as the will in question has been made, in authentic form before notaries with certain formalities, and these wills must remain with

Judgment.

OSLER,
J.A.

the notary, Articles 843, 844: and of these it is provided by Article 856 that the original and legally certified copies make proof in the same manner as other authentic writings, i. e., they are authentic, and make proof of their contents without any evidence of the signature or seal appended to them, or of the official character of the officer. But these provisions fall far short of shewing that some other evidence is not necessary to authorize the executor named in such a will to act. He may not be obliged to produce the will before any Court for probate as authority to act under it. The authentic will makes proof of itself — of its contents and execution. But the executor, I should assume, would necessarily have to prove the testator's death in any proceeding he might have to take under it, and that the will had not been revoked: Article 756. How this may be I do not know, and see no precise provision bearing upon it in the Code. But this shews how far such a document is from being the equivalent of letters probate or letters of administration which import death leaving an unrevoked will or death intestate.

There is nothing to shew that notaries have in any way the status of a court, and the learned Judge was right in saying that the document produced before him could not be said to be a legal document of the same nature as probate or letters of administration granted by a court of competent jurisdiction. The will, in short, may "make proof" of itself as an authentic document, but that falls far short of shewing that there is any one in existence who has been clothed with present authority to act as the executor of the testator.

The application must therefore be refused.

Appeal dismissed.

IN RE CHRISTIE AND TORONTO JUNCTION.

Municipal Corporations—Arbitration and Award—Appeal to Judge—Increasing Award—Evidence—55 Vict. ch. 42, secs. 401, 404 (O.)—Arbitrator as a Witness.

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A. In an arbitration within sections 401 and 404 of the Consolidated Municipal Act, 55 Vict. ch. 42 (O.), a judge to whom an appeal is taken against the award cannot, merely on his own understanding of the evidence and on a view of the premises, increase the amount awarded.

Per BURTON, and OSLER, J.J.A. The judge can deal with the award on the merits, and can increase or reduce the amount or vary the decision as to costs.

In the result the judgment of ROSE, J., 24 O. R. 443, was affirmed.

An arbitrator may be examined as a witness upon a motion to set aside an award or in an action upon an award, but such examination must be limited to matters of fact arising in connection with the reference and award, and cannot be pressed to the length of asking the grounds and reasons for making the award.

Remarks as to the great expense of land arbitrations under the Municipal Act.

THIS was an appeal from the judgment of ROSE, J., *Statement.* reported 24 O. R. 443.

Christie was the owner of some houses on Annette street, in the town of Toronto Junction. The town altered the grade of the street, and by so doing "injuriously affected" the houses in question, as the claimant alleged. An arbitration was had, and after a great deal of evidence had been taken, two of the arbitrators, the third dissenting, awarded the claimant \$200 damages and ordered the town to pay two-fifths, and the claimant three-fifths of the costs of the reference and award. The evidence was taken in shorthand, but the notes of the evidence were not filed with the clerk of the council.

The claimant appealed, and the appeal was heard by ROSE, J., who took a view of the premises and, without hearing further evidence, increased the award to \$1,000 and full costs.

The town then appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 5th and 6th of December, 1894.

Aylesworth, Q. C., and C. C. Going, for the appellants.

W. R. Riddell, and A. Cecil Gibson, for the respondent.

Judgment. January 15th, 1895. HAGARTY, C. J. O.:—

HAGARTY,
C.J.O.

My examination of the voluminous evidence leads me to the strong belief that it was fully capable of supporting the contentions of both the claimant and the town according as its credibility and weight would be determined by the referees.

If a jury had found the damages awarded, I am satisfied no court would have interfered, as there was evidence to support the finding, and it would be impossible to hold that jurors could not in good faith have found as they did.

This unwritten law would certainly apply with equal if not still greater force to the decision of arbitrators, either selected by the parties or appointed by legal process to hear and determine.

In either case, of verdict of jurors or award, the decision is by parties judicially appointed and empowered to try controverted facts.

No court will lightly interfere with their decision. It is not like a court discussing a master's report, directed to be taken to assist the court. I am not now discussing the power of a judge under the provisions of 55 Vict. ch. 42, sec. 404 (O.).

As the case stood before the learned Judge appealed from, it was purely and simply a finding on facts, which did not commend itself to his view of the evidence. This is a matter of frequent occurrence in all divisional or appellate courts. There was not a particle of fresh evidence adduced; it all rested on the referees' opinion thereon. The learned Judge appealed from had not heard the evidence or seen the witnesses. He had merely the same advantage that this Court possesses of reading the evidence.

I feel bound under such circumstances to decide on the case as it strikes me, and I am wholly unable to agree with the course taken below. When a trial judge decides facts before him, we almost invariably accept his decision without hesitation. I believe that the evidence warranted the finding, if believed, and it is not necessary to discuss

whether it ought to be believed or discredited. I think, with much respect, that, according to the principles and practice of our courts, it ought not to have been interfered with, on any grounds discussed.

Judgment.

HAGARTY,
C.J.O.

The increase of the sum awarded to five-fold the amount, is simply the opinion of my learned brother as to the proper quantum of damages. We have now to consider the right claimed so to act. We have not had the advantage of the learned Judge's view as to the powers given by the statute. He has assumed their existence, and acts, as he says, under section 404. If this be the first instance in which the power to increase or diminish has been exercised during the past thirty years it may be well to consider the effect of the decision.

The elaborate argument addressed to us, with an exuberance of authorities, on the general law of compensation, has no reference to any decision on this peculiar statute. We have heard nothing of any filing of evidence or reasons as provided by section 401, or anything to shew that this award falls within section 401 to which section 404 specially refers.

Section 401 of the statute provides that in case of an award under the Act, which does not require adoption by the council, or in case of an award to which a municipal corporation is a party, which is to be made in pursuance of a submission containing an agreement that this section of the Act shall apply thereto, the arbitrators shall take, and immediately after making the award, shall file with the clerk of the council for the inspection of all parties interested, full notes of the oral evidence, and also all documentary evidence, and if they proceeded partly on a view, or any knowledge or skill of their own, also put in writing a statement thereof sufficiently full to allow the court to form a judgment of the weight that should be attached thereto. They are also to file a certificate showing the number of hours actually occupied in the arbitration, etc., and the fees charged, etc.

Section 404 provides that every award under the Act shall

Judgment. be in writing, etc., and shall be subject to the jurisdiction of the High Court, as if made on a submission by bond containing an agreement for making the submission a rule of such Court, and in the cases provided for by section 401, the Court shall consider not only the legality of the award, but the merits as they appear from the proceedings so filed as aforesaid, and may call for additional evidence, to be taken in any manner the Court directs, and may, either without taking such evidence or after taking same, set aside the award or remit the matters referred to the same or other arbitrators, or the Court may itself increase or diminish the amount awarded, or otherwise modify the award, as the justice of the case may seem to require.

HAGARTY,
C.J.O.

No objection was taken in this case to the non-filing of these proceedings. I only refer to it as, according to the reasons for judgment below, it is not stated that such proceedings were referred to by the learned Judge as having been consulted by him.

We must first see if this section applies to this case. It is clearly confined, as I read it, to cases provided for by section 401.

It speaks of an award made in pursuance of a submission with an agreement to apply this section to it.

Then section 404 says that every award should be subject to the jurisdiction of the High Court "as if made on a submission by a bond containing an agreement for making the submission a rule or order of such Court."

But it then proceeds to provide that in cases under section 401 the Court may consider the merits "as they appear from the proceedings so filed as aforesaid," and power is given to refer back, to call for further evidence, to set aside, or to remit the matters, and the power is given to increase or diminish the award.

There was no submission or agreement between the parties. The proceeding was on the claimant's demand for compensation, appointing a referee—Judge Morgan. The defendants failed to appoint one, and the Judge of the County Court appointed Mr. Armour as referee for the

defendant corporation. These two appointed the third, **Judgment.**
Mr. Osler. **HAGARTY,**
C.J.O.

It appears to me that we must confine the application of these extraordinary powers under section 404 strictly to cases clearly falling under section 401.

The clause containing these large powers first appears in 1866, 29 & 30 Vict. ch. 51.

No case cited to us in the elaborate argument shewed any exercise of this power to increase or diminish on the opinion of a judge.

Even if this case be within the provision, it will be observed how it is guarded, and the judge has the fullest means of ascertaining whether any legal principle has been violated.

He can fully ascertain by calling for fresh evidence if (for example) some claim for damages had been rejected on some legal ground, of which he could not approve, or on the other hand, improperly admitted.

I am strongly of the opinion that the Legislature could not have intended to revolutionize the whole law as to arbitrations, by placing it in the power of a judge after reading over the evidence to say: "The \$500 damages are insufficient, I increase them to \$1,000," or: "The \$500 are excessive, I reduce them to \$5."

If this was meant, it is singular that the costly proceeding of swearing three referees to exercise rightly their judicial functions should not have been abolished, and the evidence taken by an officer or examiner of the Court.

It seems, as interpreted in this case, a most portentous inroad upon the whole system of arbitrations. Not quite so extensive in operation, but as important in principle, as holding that in all cases every finding by a jury might be increased or diminished on appeal to the High Court.

As to the alteration in the payment of costs—unfortunately in this most unfortunate case, a more important matter than the award of damages—I am unable to agree with the judgment appealed from.

Judgment.

HAGARTY,
C.J.O.

The arbitrators directed the claimant to pay three-fifths of the costs.

The statute (section 399) gives them full power to award the payment by one to the other of the costs, or any portion thereof.

I think they had the best means of forming an opinion as to the fairness of this division considering the conduct or management of this case, in the bringing forward of the numerous witnesses, and the nature of the evidence of the 50 witnesses called, and the duplication and quinduplication of the endless points relevant and irrelevant.

A single example may suffice to warrant the exercise of some controlling power in awarding costs.

The claimant calls an engineer who is asked 250 questions. The defendants then call an engineer who is asked 683. The claimant then calls back his witness, the first engineer, who is asked 290 more questions; and so the marvellously prolix examinations continue from day to day.

Without further illustration there is surely enough here to call for some exercise of judicial discretion as to costs.

I presume, although nothing is said in section 404 as to varying the costs, that the claimant's contention is that there is the right under the words "modifying the award."

My learned brother in his judgment speaks of having taken a view of the property under Consolidated Rule 701, and the effect of such inspection on his mind.

The appellants object to this, as the present appearance of the property could not shew the former state of the ground at the time of the erection of the houses, which forms an important portion of their resistance to the claim.

I most sincerely regret that a claim like this can only be determined by inflicting on one or other of the litigants an enormous amount of costs, utterly disproportioned to the amount in dispute.

Such cases as these—and we have seen too many of them—are the scandal of the present administration of

justice, and it is to be hoped that their occurrence may call for some legislative interference.

Judgment

HARRIS,
C.J.O.

When the Legislature gave this large power of increasing or reducing the award to the judge, we may assume that they meant that the power would only be exercised on the ordinary well settled principles of legal practice.

If they meant to confer an arbitrary power to interfere merely on the judge's opinion on the merits, not on the opinion of the chosen arbitrators, then it seems to me subversive of the whole principle of arbitration.

Every finding on a reference must be on motion, if either party demurs, also sanctioned by a judge.

Arbitrations are proverbially costly. This course of proceeding will add much to their expensive reputation. Arbitration was introduced into our municipal legislation with a view of providing an easier and cheaper way of arranging disputes, instead of leaving the parties to the costs of a regular law suit.

Case after case has been before us of late where it is evident that the costs of the arbitration have been double or treble that of any ordinary suit tried in court. I think I may safely say that this case tried in the ordinary way, with or without a jury, would have been disposed of in one-third of the time, and at a fourth of the cost of this arbitration. It is an evil of great magnitude, impoverishing the litigants, and reflecting discredit generally on the law.

There are some decisions on this subject, on a peculiar statute of the Province of Quebec giving power to the courts to vary the amounts awarded for expropriated property.

Certain commissioners made their award. The owners, dissatisfied, brought an action to augment the amount, under the provisions of the Act.

The Superior Court augmented the compensation to double the commissioners' award. The Court of Queen's Bench reversed the decision and restored the original amount.

Judgment.

HAGARTY,
C.J.O. On appeal to the Judicial Committee, the matter was very fully discussed: *Morrison v. Mayor, etc., of Montreal*. 3 App. Cas. 148.

Their Lordships dismissed the appeal, affirming the first award. They say (at p. 157): "The onus of proving error on the part of the commissioners lay upon the plaintiffs * *. Their Lordships are of opinion that (their report) ought not to be lightly overturned, and that the learned Judge did not give sufficient weight to it. He treated the question before him as he would have done if he had had to assess the amount of compensation in the first instance. He said he must determine it according to the evidence which he had heard, and by which he considered himself to be bound as absolutely as he would be by evidence proving the items of a tradesman's bill, * *. The learned Judge seems to have taken too narrow a view of his functions. It was his duty to make use of his own judgment and experience in deciding whether the opinions of the witnesses were sufficient to outweigh the judgment of the commissioners."

In cases like that, the whole case and evidence was gone into afresh by the Court applied to.

Very similar is the case of *Lemoine v. Montreal*, 23 S. C. R. 390, the first Court augmenting the award; the Court of Queen's Bench reversing that judgment, and the Supreme Court restoring the award.

The judgment deals with the weight to be attached to awards and refers to *The Queen v. Paradis*, 16 S. C. R. 716, (more fully reported in 1 Exch. C. R. 191, 779) where the Supreme Court reversed the augmented finding and restored the original award.

See also the late case of *Mussen v. Canada Atlantic R. W. Co.*, 23 Canadian Gazette 111, not yet in the regular reports, where the original award was restored and the order of the Court below increasing it was reversed.

The principle is laid down in our Supreme Court, that "the Court must be satisfied, beyond reasonable doubt, that some wrong principle has been acted on, or something

overlooked, which ought to have been considered by the arbitrators."

Judgment.

HAGARTY,
C.J.O.,

It is to be remembered that in these Quebec cases the parties impugning the award had to bring forward their evidence to prove it erroneous, and to rebut, or as the Judicial Committee puts it, to outweigh, the judgment of the parties making the award.

In this case no such attempt was made to shew the award erroneous by evidence adduced for the purpose.

I think that the appeal should be allowed, and the award restored as originally made.

- I proceed, chiefly, on the ground as to the proper exercise of judicial discretion, and on the principle that the statute never intended to leave every award to be increased or diminished merely on the evidence which was before the arbitrators and without further evidence or enquiry.

BURTON, J. A. :—

The power exercised by the learned Judge is given by section 404 of the Municipal Act [55 Vict. ch. 42 (O.)], which authorizes a judge of the High Court not only to set aside the award or remit the matters referred, or any of them, from time to time to the consideration and determination of the same arbitrators or to any other person whom he may appoint as prescribed by the Act respecting arbitrations and references, but also to himself increase or diminish the amount awarded, or otherwise modify the award as the justice of the case may seem to require.

Previous to this statute, except in cases specially provided for, the jurisdiction of the courts was confined to setting aside the award or remitting it back for further consideration, and it effects a very great change in this kind of award, placing the judge in the position of a sole arbitrator or umpire in addition to the powers he previously possessed, and the exercise of the power ought not, in my opinion, to be interfered with unless upon very substantial grounds.

Judgment.

BURTON,
J.A.

The award of the arbitrators was also entitled to great weight, and I agree ought not lightly to have been interfered with, but it is not without significance that it was only the judgment of the majority.

Whether the change effected is or is not a wise one, was for the Legislature; we have only to carry into effect its clear provisions. Speaking for myself, I think it was legislation in the right direction, with the view to the saving of expense and putting an end to references back to the same or other arbitrators. If a judge is competent on reading the evidence to set aside the award or to refer the matter back, why not equally so to modify the award, or increase or reduce the amount.

If the case is not within section 404, *cadit quæstio*, the Judge had no power, and his judgment is a nullity, but no such point was taken, and it appears to me to be too clear for argument that the case is within the statute, and if there was a reasonable doubt about it, it should be re-argued, as no such point was taken at the hearing.

It is said that the learned Judge had not the same opportunity of determining as to the weight of the evidence as the original arbitrators who had the witnesses before them and could judge by their demeanour and manner of giving their evidence of the credence to be attached to it, but in this respect the case does not differ from the cases constantly arising in which we have to decide upon judgments of the Divisional Court where they have differed from judges of first instance, where it is sometimes and not always logically said we are dealing now with the judgment of the intermediate court and cannot interfere with it unless satisfied that it is substantially wrong, although we might not have arrived at the same conclusion; with this broad distinction in favour of the award which is here attacked that the learned Judge could call for additional evidence which I presume would include the re-examination of witnesses already examined if their evidence were left obscure or unsatisfactory.

The same consideration which would prevent us from

now interfering with the judgment appealed from should have had, and no doubt did have, its weight with the learned Judge before interfering with the award of the arbitrators. We cannot assume that he capriciously, and without good reasons, took the strong course of increasing the amount awarded.

Judgment.

BURTON,
J.A.

I do not think it ever could have been intended for this Court nicely to weigh the evidence given on both sides, and to reverse the judge below, even though, if we had been in his position, we would have allowed the former award to stand, but a perusal of the evidence has led me to the conclusion that that given by the claimant strongly predominates, and meets in a very satisfactory way many of the positions taken by the town—notably as to the character of the land where the houses were erected, and other matters of a like kind. But a close analysis of the evidence need not to be gone into, and I do not think an appeal of this kind should be dealt with on that basis. An award made by a judge specially empowered to deal with an award upon the evidence before the arbitrators, and with power to increase or reduce, or modify the award, is at least entitled to as much weight and consideration as the award of an arbitrator under ordinary circumstances. If the learned Judge, or indeed any other person, had been appointed sole arbitrator in this case, can it be urged that any court could interfere to set aside such award as he has made, always bearing in mind that in reviewing the arbitrators' finding, every reasonable intendment should have been made in favour of it.

We might have hesitated before interfering with the first award, and we may credit the learned Judge with a like hesitation before interfering as he has done.

Some cases were cited from Lower Canada. The statutes are not the same, but the principles governing the dealing with awards are set forth in the judgments, and are applicable, I think, to cases under our own statute, but it will be seen that in each of the cases cited the Courts were dealing with the intermediate judgment affirming the

Judgment.
BURTON,
J.A.

arbitrators' decision. I quite agree with Mr. Justice Taschereau in what he says about the extreme difficulty of interfering, but I do not go quite the length of holding that the judge must be satisfied beyond all reasonable doubt that some wrong principle has been acted on. I think I am bound to give credit to my learned brother having all these considerations present to his mind, and the onus is now on those impeaching his judgment to prove that he is clearly wrong.

Apart from any other consideration, I think I must follow the rule so frequently adopted in this Court in such cases as *Hale v. Kennedy*, 8 A. R. 157, where Lord O'Hagan's remark so frequently quoted was followed, when he says (*Symington v. Symington*, L. R. 2 Sc. App. at p. 424): "Besides, we are concerned directly not with the judgment of (first instance), but with that which overruled it; and the latter we ought to affirm, unless we are convinced of its error."

On the short ground, therefore, that I am not convinced of its error, I think the judgment appealed from should be affirmed and this appeal dismissed.

OSLER, J. A. :—

The claim of the respondent, the landowner, was that his property situate on Union and Annette streets, in the town of Toronto Junction, had been injuriously affected by the corporation filling in and raising the grade of those streets. The landowner appointed one arbitrator, and the County Judge, on the failure of the corporation to appoint one, appointed another, pursuant to section 394 of the Municipal Act [55 Vict.ch. 42(O.)], and these two appointed a third.

The award was made by two of the arbitrators; one of the three not concurring with the others as to the amount awarded, which was only \$200.

The landowner moved against the award before Rose, J., on various grounds, among others that one of the arbitra-

tors by whom it was made was disqualified, by reason of interest as having been counsel who had advised the solicitor of the corporation in various matters other than the matter in question. As to this objection, it is sufficient to say that it was wholly unfounded, and that there is nothing in the facts relied upon to affect the competency of the learned arbitrator appointed by the County Judge, or to shew that there was the least impropriety in his acting.

Judgment.
O'LEER,
J.A.

There was also taken, by way of cross-appeal, in the Court below, an objection to the constitution of the reference. It was said, that under 55 Vict. ch. 91, sec. 2 (O.), there should have been only one arbitrator. The learned Judge was opposed to this contention, and it was not renewed before us.

It is desirable to refer to the course which was taken by the respondent in examining the arbitrators on the motion to set aside the award. That an arbitrator or umpire may be examined as a witness on such a motion or in an action upon the award is clear, but the scope of the examination in this case was far too wide. The arbitrators were asked their reasons for arriving at their conclusion, the ground of their award, and so forth, all of which they properly refused to disclose.

The whole question was very fully considered in *Duke of Buccleuch v. Metropolitan Board of Work's* L. R. 3 Exch. 306; L. R. 5 Exch. 221; L. R. 5 H. L. 418: The arbitrator is competent generally to shew "what was the subject matter into which he was enquiring, and upon which his judgment therefore was to be founded. This would enable us to judge whether he was acting within his jurisdiction or not, for a person exceeds his jurisdiction by prosecuting a judicial enquiry in a matter over which he has no jurisdiction, quite independent of the judgment eventually given," *per* Cleasby, B. (at p. 433), and *per* Lord Cairns (p. 462): "Upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator was properly admis-

Judgment. sible. He was properly asked what had been the course
OSLER, which the argument before him had taken—what claims
J.A. were made and what claims admitted; so that we might be
put in possession of the history of the litigation before the
umpire up to the time when he proceeded to make his award.
But there the right of asking questions of the umpire
ceased." In the case before us the enquiry was prosecuted
as to the actions and conduct of the arbitrators after that
time, viz., as to how and why they arrived at the amount
awarded by them, and this was improper.

Then as to the merits of the appeal. The arbitration
was constituted under the provisions of section 391 of the
Municipal Act [55 Vict. ch. 42 (O.)], between the corpora-
tion and the owner of real property, not real property
entered upon, taken or used by the corporation, but
real property injuriously affected by it in the exer-
cise of its powers, and the arbitrators were appointed
as provided by that section and section 394. An
award made in regard to a claim of that nature is
one which does not require adoption by the council, and
the provisions of sections 402 and 403 do not apply to it.
Section 401 is the section which applies. That section
provides for two entirely distinct cases:—First, the one
before us, which is the ordinary case of an award under
the Act, in respect of property injuriously affected, made
upon a reference constituted under sections 391 and 394,
namely, by the simple nomination and appointment of
arbitrators; and secondly, the case of an award to which
a municipal corporation is a party, to be made in pursu-
ance of a submission containing an agreement that the
section (401) should apply. Such a case was that of
In re Prittie and Toronto, 19 A. R. 503. In both cases
the section prescribes that the arbitrators shall take
and file with the officer named, for the inspection of parties
interested, full notes of the oral evidence, and also all
documentary evidence, and if they proceed partly on a
view or any knowledge or skill possessed by themselves
they shall also put in writing a statement thereof suffi-

ciently full to allow the court to form a judgment of the weight which should be attached thereto. The object of all this is shewn by section 404, which enacts that every award under the Act shall be subject to the jurisdiction of the High Court, and that in the cases provided for by section 401 (others being specially provided for by section 403) that Court shall consider not only the legality of the award, but the merits as they appear from the proceedings so filed, and may call for additional evidence, and may, either without taking such evidence or after taking such evidence, set aside the award, or remit the matters referred from time to time to the consideration and determination of the same arbitrators, or to any other person whom the Court may appoint, and fix the time within which such further or new award shall be made. Or the Court may itself increase or diminish the amount awarded or otherwise modify the award as the justice of the case may seem to require.

To these provisions may well be applied the observation of Patterson, J., in *Green v. Citizens' Insurance Co.*, 18 S. C. R. 338, at p. 370, that they are "in the spirit of the day, which tends to bring the subject of arbitration more under the supervision and control of the court than formerly, and to place it more fully on a footing with other forms of litigation." And it cannot fail to be remarked that the jurisdiction conferred by them upon the High Court is not only not in terms described as an appeal but that it is of the widest and most comprehensive character possible. To deny that these sections confer upon the High Court the power to deal with the case when brought before it with regard to the weight of evidence as well as with the legality of the award is simply to emasculate them and to limit the jurisdiction of the Court contrary almost to their very words. The Court is to be placed, says section 401, in a position to form a judgment of the weight which should be attached to a view taken by the arbitrators, or to any knowledge or skill possessed by themselves where they proceed partly upon anything of that kind, and by section

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

404, the Court shall consider not only the legality of the award but the merits as they appear from the proceedings filed. It may, it is true, call for additional evidence, but the power to deal with the case is not dependent upon that, for either without taking such evidence, or after taking it, it may set aside or remit back the award, or may increase or diminish the amount awarded, or otherwise modify the award as the justice of the case may seem to require.

It would be difficult, I think, to find an instance in which larger language has been used to confer upon any court the power to review and modify an arbitrator's finding. It goes far to neutralize the force of some of the decisions which have been cited to us dependent upon different statutory provisions in other Provinces. It may well be conceded, that the court, in dealing with the evidence, will attach, or ought to attach, due weight to the fact of the award having been made, and where the arbitrators proceed, or may seem to have proceeded, merely upon evidence of opinion and conflicting testimony as to the value of property, that it will not, and ought not, readily to interfere, and the same observation may be made where the question is one depending simply upon the veracity of the witnesses. But subject to these considerations, which every judge will have regard to when dealing with a decision, and which, speaking for myself, I have always observed, when sitting in the High Court and hearing applications of this kind, he has no right to refuse, and the parties have the right to require him, to consider the merits of the case as they appear from the proceedings filed, and to deal therewith as justice seems to require. This my learned brother Rose has, in the case before us, done, and we are concerned, not with the award, but with his decision.

It is quite possible that other judges might not have dealt with the case in the same way. They might have attached more weight than he has done to the award or might not have seen their way to measure the damages with so liberal a hand, depending very much upon the

way in which they incline to view claims of this nature. But unless we can say that he is wrong, we ought not to interfere, even if we think the award might better have been left undisturbed. For myself, I must say, after having read the evidence and my learned brother's judgment, and having due regard to the fact that he himself, within his right under Consolidated Rule 701, inspected the premises, that I think that his decision is more in accordance with what the justice of the case seems to require, having in view, the facts, and not the mere opinions deposed to, than was that of the arbitrators.

Judgment.

OSLER,
J.A.

I think the great preponderance of the evidence supports his judgment, and that it is a judgment in accordance with the merits of the case. To set forth the evidence at large would serve no good purpose. I have gone through the whole of it, and parts of it more than once, and we had the advantage of hearing it very carefully analysed on the argument by Mr. Gibson and other counsel engaged. I think it supports the contention, and unless we are prepared to lay it down as a hard and fast rule that in no case under this statute should a judge interfere upon the weight of evidence, we ought, in my opinion, to dismiss this appeal. That instances are not to be found reported of its having been done is probably due rather to the fact that damages in cases of this kind are not usually weighed by the arbitrators in golden scales, as indeed they ought not to be, than to any doubt as to the power conferred upon the court by the section. With regard to the costs. They were as much within the power of the learned Judge as the rest of the award, and I am not prepared to say that he was wrong in disposing of them as he did. No doubt the arbitrators' disposition of them was very much, if not altogether, owing to the fact that they awarded so small, and I think so unreasonable, a sum in comparison with what the claimant had offered to accept.

Something has been suggested as to the case not being within the section of the Act, because, as I understand it, it has not been shewn that the evidence was filed as sec-

Judgment.

OSLER,
J.A.

tion 401 requires. We know, unfortunately, that very full notes of the evidence have been taken, and if they had not been filed or there had been any other irregularity the objection would, no doubt, have been taken in the Court below or before us. The motion was made under the Act, and none of the parties have suggested that it was not perfectly regular. Moreover, it was the duty of the arbitrators to file the evidence with the clerk of the council, the case being one within section 401, and the reason why they are required to do so is that all parties interested may be able to inspect it. Here, even if they have not filed it, that object has been attained, and no one has suggested a doubt that the evidence laid before the Court on the motion against the award was not authentic.

It is greatly to be regretted that the evidence was taken at such enormous length and that the proceedings before the arbitrators were so protracted, but it must be said that the expensive and costly character of the proceedings is, to a very great extent, owing to the nature of the procedure itself, by which the Legislature has required these claims to be determined. Instead of a single paid judicial officer sitting *de die in diem* exercising some control over the evidence we have a board of three arbitrators, who meet when they can conveniently do so with regard to their other engagements, and whose sittings, in this case, were extended in a desultory way over several months. When evidence is taken under such circumstances it is almost necessarily broken in upon and renewed and sometimes repeated. Here we have an appeal book of seven or eight hundred pages, and the enormous sum of \$1,415 paid for arbitrators' fees, besides stenographer's charges, and the ordinary costs, and all in relation to a claim of \$200, or \$1,000. I repeat it is the fault of the system more than of the parties, and it is time that the Legislature interposed a remedy for this grievous oppression of litigants.

The appeal should, in my opinion, be dismissed. Considering the whole case, I think the appellants ought to have been satisfied with the judgment of Rose, J., instead

of incurring the cost of a further appeal, in which the appeal book alone costs as much as the damages he awarded. There is no reason, therefore, why they should not pay the costs of the appeal.

Judgment.
OSLER,
J.A.

MACLENNAN, J. A.:—

I think, for the reasons given by the Chief Justice, in whose judgment I fully agree, that this appeal should be allowed.

*The Court being divided in opinion,
the appeal was dismissed with costs.*

IN RE BURNHAM ET AL.

*Water and Watercourses—Water Privileges—"Occupied Mill Privilege"—
R. S. O. ch. 119.*

There can be no interference whatever, under the Act respecting Water Privileges, R. S. O. ch. 119, with an occupied mill privilege, even though the authorized works would not affect the mode in which the occupied mill privilege has, up to the time of the application, been used.

An order made under the Act must state specifically the height of the authorized dam.

Order of the County Judge of Peterborough set aside.

Statement.

THIS was an appeal by James M. Irwin from an order of His Honour Judge Weller, Judge of the County Court of Peterborough, made on an application under the Act respecting Water Privileges, R. S. O. ch. 119.

The applicants, John Burnham and Arthur Stevenson, were the owners of land on both sides of the river Otonabee, at a point where a dam had formerly stood, and they obtained an order authorizing them to erect a dam to a height sufficient to raise the water 60.5 feet above a datum line on a plan of the proposed works. The effect of the erection of the dam would have been to pen back the water to a point further up the river than the limit of land owned by the appellant, and used by him in connection with a mill owned by him. There would not have been, however, any interference with the water-power of the appellant as actually used. The learned Judge allowed the appellant \$32.50 as compensation for the portions of land that would be flooded, but gave him no compensation or damages for any other injury that might result from the works. It was shewn that the applicants wished to use the dam to furnish water-power for the Peterborough Water Company.

Pursuant to leave obtained Irwin appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 29th of March, 1894, when the argument was adjourned to enable further evi-

dence as to title to be produced, and on the 28th of May, 1894. Argument.

Cassels, Q. C., and E. B. Edwards, for the appellant. The Judge of the County Court had no jurisdiction to make this order. Such an order cannot be made if the result will be to interfere with an occupied mill privilege: sections 2, 20 and 21. The appellant is using and occupying his mill privilege, and damming back the water in the mode proposed will interfere with it. It is immaterial that the present mode of user will not be interfered with. The possible user is protected just as much as the actual user. A "mill privilege" is the whole fall from the highest point to the lowest, and the unused force is just as much the owner's property as that portion which is not permitted to escape: see *Occum Co. v. Sprague Manufacturing Co.*, 35 Conn. 496; and *Elting Woollen Co. v. Williams*, 36 Conn. 310, decided under an analogous statute. The words "mill site" are used in this statute, but that, it is explained, means exactly the same thing as "mill privilege," and these authorities are directly applicable. But even if there is jurisdiction the order is wrong. It does not define the height of the dam, and this a direct violation of section 8 of the Act. The respondents are endeavouring to obtain under cover of this Act rights which they can obtain, if at all, only under the Act respecting Water Companies, R. S. O. ch. 164, where a different procedure as to the ascertainment of compensation is provided.

W. R. Meredith, Q. C., and R. E. Wood, for the respondents. The construction of the Act contended for by the appellant is too narrow, and if given effect to would destroy the usefulness of the measure. The policy of the Act is clearly to prevent a valuable water power from being only partially used. If the water power owned by one person is greater than is required for the actual commercial uses of that person, another person is entitled to come in and make use of the unused and theretofore wasted excess. It is clear that riparian rights are inten-

Argument. ded to be interfered with, but narrowed as the appellant asks that it be narrowed, the Act would be a mere statutory recognition of the sacred rights of the riparian owner and would be a nullity. The Act is founded on the Connecticut Act, but section 2 is new and was evidently passed to get over the construction given to the Connecticut Act which is much wider in the protection it affords. Section 2 of our Act controls sections 20 and 21, and shews that the mill privilege that is not to be interfered with is one that is being used for mechanical, manufacturing, milling, or hydraulic purposes, and it is only to the extent that it is being so used that it is protected: *Parry Sound Lumbering Co. v. Ferris*, 18 C. L. J. 413. There is nothing in the technical objection as to the form of the order. It mentions the height to which the water is to be raised, and inferentially therefore fixes the height of the dam.

Cassels, Q. C., in reply.

January 15th, 1895. OSLER, J. A. :—

I am of opinion that the appeal should be allowed.

(1) I think it has been shewn that the dam which the respondents propose to erect will interfere with or encroach upon the occupied mill privilege or water power of the appellant, and therefore under sections 20 and 21 of the Act the County Judge had no power to make the order complained of without the consent of the appellant.

(2) The order is bad because it does not state the height to which the proposed dam shall be built. This is imperatively required by the eighth section of the Act, and I think for a very good reason, namely, that it clearly and definitely settles beyond controversy the right which is conferred upon the applicant by the order instead of leaving it to be thereafter the subject of dispute at any time what quantity of land had been overflowed, or how far back or to what height the waters of the river had been penned. It is at all events sufficient to say that the order is not in compliance with the Act.

(3) There is much in the appellant's argument that the application was not a *bond fide* application under chapter 119, or for such a purpose as was contemplated by that Act. The applicants are trustees of the property upon which they base their application, for a water company called the Peterborough Water Company, incorporated under R. S. O. ch. 164, and the object of acquiring the mill privilege or water power they are now seeking to obtain is that they may lease the power to the company of which they are also directors, whose present power is not adequate for the purpose of supplying water to the town. In addition to supplying power to the waterworks company the applicants' intention also is to rent the power so far as there may be more than enough for the company's purposes. They are in short, attempting to acquire the privilege now in question as a speculative investment.

Judgment.

OSLER,
J.A.

The application, upon the evidence, has every appearance of an attempt by the company, whose property alone in the name of their trustees forms the basis of the application, to evade the requirements of section 35 of their Act, and to exercise compulsory powers without the sanction of a by-law of the municipality as required by that section. It is not perhaps necessary to express a final opinion upon this point, because I think the appeal should be allowed for the other reasons already given.

I do not wish to be understood as assenting to the mode in which damages have been assessed in this case, assuming that the water privilege was not an occupied one within the meaning of the Act, and therefore one which the applicants might obtain an order to expropriate. Compensation should be based upon the value of the rights of property of which the owner is deprived, not depending upon the question whether he had used them in the past or not: *Trent-Stoughton v. Barbados Water Supply Co.*, 1 R. 403.

MACLENNAN, J.A. :—

The order complained of is composed of two parts, one bearing date the 16th of September, 1892, and the other the

Judgment. 1st of June, 1893, and it empowers the petitioners to erect
MACLENNAN, and maintain a dam upon their privilege to a height suffi-
J.A. cient to pen back the water of the river to a height not
exceeding 60.5 feet above a certain defined datum line, and
so as to overflow certain described lands, and it awards
to Irwin the sum of \$32.50 as the value of the lands
owned by him, to be taken or used by reason of the build-
ing of the dam.

Section 1 of the Act authorizes the owner of a water
privilege desiring to improve it, to apply for authority to
the county judge to take, acquire, hold and use such por-
tions of any lands as may be necessary for the improve-
ment or maintenance of his privilege.

By section 7 the judge is to grant the application if he
is of opinion that its allowance will conduce to the public
good, and is proper and just under all the circumstances of
the case.

By section 8 he is to state in his order the height to
which the dam may be built; and to assess the value of
land taken, and compensation for injury done, and to make
such order as to costs as to him seems just.

By section 10 the applicant is entitled to receive a con-
veyance of the lands, or of the rights mentioned in the
order, on payment of the sum awarded, and costs, if any.

By section 20 it is provided that no occupied mill privi-
lege or water power shall be in any manner interfered
with or encroached upon without the consent of the owner;
and by section 2 an occupied privilege or power means a
mill privilege, water power, or mill which has been or is
in use for mechanical, manufacturing, milling or hydraulic
purposes, or for the use of which for any such purposes
the necessary works are in course of erection.

Section 3 makes special provision for the case of a privi-
lege or power which has been used, and is not at the time of
the application made in actual use for such purposes, but it
is not necessary to state its effect, inasmuch as in the state-
ment of the case, and in the reasons against the appeal,
the appellant's privilege is admitted to be an occupied mill

privilege. The same thing was admitted on the argument, as I understood it, except that Mr. Meredith contended that so much of the head or fall of water as lay below the existing dam could not be regarded as occupied within the meaning of the statute. Judgment
MACLENNAN,
J.A.

By section 21 no dam may be erected, or other powers exercised, to the injury of any mill lawfully existing either above or below it on the stream; nor shall the privilege of the owner be affected by the erection thereof.

Sections 4, 5 and 6 prescribe the practice to be followed on the application to the county judge, and require a statement to be prepared and filed containing a general description of the lands sought to be taken or acquired, held, used, or otherwise affected, together with a map or plan thereof; (2) the names of the owners or occupants thereof; and (3) everything necessary for the right understanding of the map or plan, including a registrar's certified abstract of the titles to all the lands to be affected by the application.

I assume that the petition set out in the case is the statement required by the Act to be filed, and that the registrar's certified abstract of titles was not brought before us for the reason that there was no dispute about the titles as mentioned by the learned county Judge, when it was proposed by Irwin's counsel to put in copies of the patent and title deeds.

The petition describes certain small parcels of land, by metes and bounds, upon which the waters to be backed up by the proposed dam shall encroach, of which two small parcels on the east bank are said to belong to Irwin, and a small parcel on the west bank to one George Harvey. Then, it is said in the petition that certain portions along the margin of the river, will be covered by the water as intended to be raised and penned back; but it is said that these portions of the banks are nearly or quite perpendicular, so that the waters do not spread over or cover any appreciable quantity of land along the margin of the river, except the parcels specifically described. With the ex-

Judgment.

MACLENNAN,
J.A.

ception of the several small parcels so described there is no statement or suggestion in the petition to whom the bed of the stream or its banks belong, although it is sought to obtain the right to raise the water in that bed and along its banks from one to fourteen feet above the natural level. It has evidently been overlooked that the owners of the bed and the owners of the banks of a watercourse have a right to have the water flow past in its accustomed manner, and with its natural velocity, and at its natural height, and that the mill owner or other riparian proprietor lower down may not back water upon them, so as to retard the flow, or to raise the level of the stream on their land. The petition ought to have stated not merely the owners of the dry land intended to be overflowed, but also the owners of the bed and banks of the stream as far up as it was desired to obtain the privilege of backing the water, and not having done so, I think it was and is defective, and that the order obtained under it is not binding in any way upon such last mentioned owners who were not brought before the Judge.

On the proceedings before the learned Judge it appeared that Irwin owned the land on both sides of the river for some distance both above and below his mill, and that on the east or Douro side it had extended down stream to a distance of a little more than half a mile below his dam. On the west side his land extended in like manner from the dam a distance of fifteen chains or 330 yards. Therefore, Irwin was not only a riparian proprietor on both sides of the stream for 330 yards, and presumably therefore the owner of the bed of the stream for that distance, but he was also riparian proprietor on one side 500 yards farther, and owner of half the bed for that further distance, and although the dam authorized to be built will back the water all the way up to his dam, no notice of that invasion of his legal rights either as riparian owner or as owner of the bed of the stream is taken in the order, nor is any compensation awarded therefor. It was said that Irwin was not a riparian proprietor on the east or Douro

side of the river because there is a road running along the margin and between his property and the river. But if that point were good, as far as it is supported by the facts, yet the fact is that at two points for a distance of about two chains and three chains respectively, even on the east side where the road does not run along the bank Irwin is a riparian proprietor and also presumably owner of the bed *ad medium filum*. But then also, upon the evidence already referred to, there being no proof of the nature and origin of the road along the bank, or that it is an original allowance, the legal inference must be that the soil and freehold of the road belongs to Irwin subject only to the public easement. It also appeared in evidence that after the commencement of the proceedings Irwin had acquired from George Harvey, one of the respondents to the application, a strip of riparian land extending from the former southern limit of his land some distance further down stream. The effect of that was that in respect of this new purchase he took Harvey's place in the enquiry and became from that time riparian proprietor and owner of the bed of the stream on the west side.

Judgment.
MACLENNAN,
J.A.

The learned Judge has found the value of that part of this land which belonged to Harvey, which was expected to be overflowed, and which is specially mentioned and described in the petition, including all damages to Harvey by reason of the dam and the raising of the waters to be the sum of \$175, and he says it was so found and fixed by him pursuant to agreement between the petitioners and Harvey. Now, I am unable to see that Irwin is in any way bound by this finding or agreement. The statute does not authorize a person to enter and take the lands he requires for his improvements, and then to ascertain and pay the value or compensation. What it authorizes is to obtain authority from the County Judge first, and then to take, acquire, hold and use, etc. So that until the Judge gives the authority, and even while the application is pending, the ownership may change with perfect freedom, and it was not competent to the learned Judge to award to Harvey

Judgment. compensation for land which before the date of his order
MACLENNAN, had been acquired by Irwin.

J.A.

I am of opinion, therefore, that the order appealed against is invalid as against Irwin in authorizing the backing of water over those parts of the river bed which belong to him, and of the banks of which he is also the proprietor, without ascertaining and awarding compensation therefor.

But the order was attacked by the appellant on the ground that it contravenes sections 20 and 21 of the Act. These sections are emphatic that no occupied mill privilege or water power shall be in any manner interfered with or encroached upon under the authority of the Act without the consent of the owner, and that no such dam may be erected or other powers exercised to the injury of any mill lawfully existing either above or below it on the stream, nor shall the privilege of the owner be affected by the erection thereof. I can imagine no stronger language for the purpose of preventing the improvement of one man's water privilege by the injury or impairment of a similar privilege belonging to another man without his consent. Whatever may be the true construction of section 21 where a mill privilege or water power is unoccupied, the present case is clearly within both sections. The appellant's privilege is an occupied one within section 20, and he has also a mill lawfully existing within section 21. Therefore, the Act forbids his privilege to be in any manner interfered with or encroached upon or affected, and forbids his mill to be injured; and the question is, what is this mill privilege and water power of the appellant, and will it be interfered with or encroached upon, or affected injuriously by the dam proposed to be erected and authorized by this order.

The owner of land through or by which a running stream flows, has the right to dam it for the purpose of a mill, so long as he does not thereby interfere with the rights of other proprietors above or below him: *Miner v. Gilmour*, 12 Moo. P. C. C. at p. 156; and he may divert it in its course through his land into one or more separate streams for irriga-

tion or any other lawful purpose, so long as he passes it down to his neighbour in its accustomed manner. It follows from this that he may use for his mill the whole slope or fall of the water as it passes over or by his land, and that the whole of that fall or slope, or head, as it is most commonly called, is his mill privilege or water power: *McCalmont v. Whitaker*, 3 Rawle 84. He may use this power or privilege in various ways. He may have one mill or many, according to the volume of the stream and the requirements of his business. He may have his mill or mills near his dam, or at a distance from it down the stream, and may lead the water to the latter by means of flumes or aqueducts. By such means he may obtain the benefit of the fall of the water below his dam down to the extreme limit of his property, as well as the head at the dam itself. In the present case, besides the head at the dam, the river continues to fall until it leaves the appellant's land. I think it is impossible to say that the fall below the dam is not as much a part of the mill privilege and water power, as the head at the dam itself.

If we were to accede to Mr. Meredith's argument that because the fall below the dam is not at present in use in connection with the existing mill, that part of the appellant's privilege is not an occupied privilege or power, the same reasoning would oblige us to hold that the applicants could successfully claim under the statute to expropriate the surplus water of the present dam, not required for the operation of the present mill. This river is a stream of large volume. That is matter of common knowledge, and it is also apparent from the extensive waste and spill-ways which the learned Judge has provided for in his order. Every pound of water which falls over the appellant's dam without going through his wheels is wasted, is unoccupied power quite as much as the fall down stream not at present in use. The power or privilege of a stream does not depend merely on the fall or head, but also upon the quantity or volume of the water which flows and falls, and if the unused part of the head can be expropriated as un-

Judgment.
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 MAULENNAN,
 J.A.

Judgment. occupied power or privilege, so also may the unused part
MACLENNAN, of the water. I do not think that is the true construction
J. A. of the statute. I think a privilege or power is occupied, if *bond fide* used to any considerable extent, even though capable of being used far more extensively either as to head, or as to the quantity of water. There are no limiting or qualifying words in section 20. The words are: "no occupied mill privilege." If it be occupied, it may not be interfered with, or encroached upon.

If then the appellant's power or privilege includes all the fall of the stream and the whole volume of the water flowing therein from the point at which it enters his land until it leaves it, it is clear that the proposed dam would be an interference and encroachment such as is forbidden by section 20 of the Act, for the back water is intended to reach clear up to the wheel of the appellant's mill, and to be raised seven inches upon his discharge floor.

I therefore think the order is wrong as contravening both sections 20 and 21 of the statute.

Another point was also made by the appellant's counsel, although it is hardly necessary to express an opinion upon it, namely, that section 8 of the statute has not been observed in fixing the height of the proposed dam. The order is that the applicants shall be at liberty to raise the water to a certain height, while the statute requires the order to state the height to which the dam may be built. The two things are not the same, and the appellant has a right to require a strict compliance with a statute which authorizes the taking away of his property without his consent.

I am therefore of opinion that on this ground also the appellant is entitled to succeed.

I therefore think that the appeal should be allowed, and that the order should be set aside with costs.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal allowed with costs.

TRUMBLE V. HORTIN.

Evidence—Discovery of New Evidence—New Trial—Discretion—Appeal.

Allowing a new trial on the ground of the discovery of new evidence is a matter of legal discretion, and where the subject matter of the action was of a trifling nature and a Divisional Court ordered a new trial on affidavits shewing merely the discovery of further evidence corroborative of the evidence at the trial, the order was set aside.

Murray v. Canada Central R. W. Co., 7 A. R. 646, followed.
Judgment of the Common Pleas Division reversed.

THIS was an appeal by the defendant from the judgment of the Common Pleas Division ordering a new trial on the ground of the discovery of new evidence. Statement.

The sole question of general interest in the appeal was to what extent an order of this kind was a discretionary order or subject to review, and the facts bearing upon the point are set out in the judgments.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 26th of November, 1894.

E. D. Armour, Q. C., and *A. H. Clarke*, for the appellant.

W. R. Riddell, and *H. E. Rose*, for the respondent.

January 15th, 1895. OSLER, J. A.:—

The quantity of land in dispute in this action is very small. The case was tried out at length before my brother Rose, who dismissed the action. Evidence was given on two points, viz., as to the position of the defendant's rear fence, and also as to whether a building on the land in question had been moved forward, and the finding was against the plaintiff on both. The plaintiff then moved for a new trial on the ground, *inter alia*, of the discovery of fresh evidence that the building had not been removed, producing a number of affidavits from persons who, if a new trial

Judgment.

OSLER,
J.A.

were granted, would give evidence as to that fact, but he filed no affidavit of his own or of his solicitor explaining why the evidence had not been produced at the trial, or that it was not known to him before the trial, or when he first discovered it. The Court below do not notice this in the short judgments delivered by the learned Judges, and though one of them speaks of the evidence as fresh evidence which could not, with reasonable diligence, have been discovered prior to the former trial, I have been unable to find anything in the affidavits which shews this, nor have counsel been able to point to anything of that kind. The case is one for the application of the third rule acted upon and enforced by this Court in *Murray v. Canada Central R. W. Co.*, 7 A. R. 646, at p. 656, where the authorities are cited: "The discovery of new corroborative evidence is no ground for a new trial. * * A new trial will not be granted if the evidence was known before, though too late to make use of it at the trial, and though every reasonable effort was made to produce it after it was so discovered. And there is the familiar rule, that it must be shewn that the evidence could not, with reasonable diligence have been discovered, and have been given before."

I do not wish to say that these rules will now be always acted upon as strictly as they formerly were, or that in the discretion of the Court they may not in a proper case be relaxed. But I am of opinion that the present case was not one in which they should have been relaxed. I adopt and act upon the language of Rose, J., at the trial: "The amount involved in this case is of the most trifling character, and if parties will bring into Court matters of infinitesimal moment which the Court is not at liberty to reject (meaning, as I understand the learned Judge, matters which, however small, the Court is bound to try), they must not complain if held to strict rules of evidence, and if they only get that which the law gives them." Here there was no discovery of fresh evidence but merely of new witnesses to a matter which had been already

threshed out at the trial, and I think the judgment of the trial Judge should have been *finis litium* between the parties about the trifle of land in question. With all respect, therefore, I think we should allow the appeal.

Judgment.

ORDER,
J.A.

MACLENNAN, J. A. :—

This was an action to recover possession of a piece of land twenty-five feet in length by four or five feet in width, being an alleged encroachment by the defendant upon the plaintiff by moving a boundary fence four or five feet back upon the plaintiff's land and building a shed over the land so enclosed. Both parties claimed title to their respective holdings by *mesne* conveyances under the same original owner, one George Munro, but the witnesses were unable to define upon the ground the limits described in the title deeds, and the case turned altogether upon evidence of occupation. It appeared that the defendant and those under whom he claimed had occupied continuously a dwelling-house and land fronting upon Goyeau street, in the town of Windsor, twenty-five feet in width and extending about forty feet back to the plaintiff's land, for more than twenty years before action, during which time a board fence, with posts let into the ground, stood as their dividing boundary, and the plaintiff's case is that in May, 1892, the defendant moved the fence back several feet and took possession of the land in question. This was wholly denied by the defendant. It appeared that originally the defendant's house stood within about two feet of the fence in question, and the narrow space between the house and the fence was used as a passage-way from a public lane on the south side of the defendant's house to a private lane on the other side, and that this narrow passage was used exclusively by the defendant and his tenants, the back door of the house opening upon it. At the time of the action that passage-way was admitted to be between four and five feet wide, so that it was clear that either the defendant's house had at some time afterwards

Judgment. been moved forward or the boundary fence had been
MAGLENNAN, moved backward. There was no other way of accounting
J.A. for the increased width of the passage-way. The defendant's case was that in the year 1893 or 1894 he had made extensive alterations in his dwelling-house. It was a frame house, and originally stood upon posts. In that year he dug a cellar under it, removed the posts, and built a stone and brick foundation under it, and he alleged that at the same time he moved the whole house forward to the front, to the street line, a distance of twenty-seven or thirty inches, which accounted for the increase in the width of the passage-way. The defendant admitted having taken down the old boundary fence in 1892 and having rebuilt it, but he alleged that he had built the new fence upon the same line as the old. The statement of defence does not set up that the defendant had widened the passage-way by moving his house, but that such was his way of accounting for the increased width was known to the plaintiff before the trial. It seems that some time before the trial there had been an examination of witnesses before Mr. Marcon, the Master, for some purpose, and at the trial the plaintiff's counsel, who was also his solicitor, asked the defendant, in cross-examination: "You knew while you were in Marcon's office that we denied that you moved the house? I knew in Marcon's office that you talked about it." The importance of the question whether the house had been moved did not, therefore, first emerge at the trial, but was well known before that to the plaintiff, and he accordingly made it a part of his case in chief to establish that no such removal had ever taken place.

Besides controverting the plaintiff's evidence on this point the defendant adduced evidence to shew that the new fence was built on the same line as the old. There were twenty-one witnesses examined altogether, and at the conclusion of the case the learned Judge dismissed the action, having evidently given credit to the evidence called by the defendant that the fence had been rebuilt on the old line, and that the house had been moved forward at the

time the new foundations were placed under it. The plaintiff moved for a new trial on a number of grounds of which the only one which could be seriously urged was the discovery of new evidence. Judgment.
MACLENNAN,
J.A.

On the evidence as it stood at the end of the case there could be no possible ground for questioning or disturbing the judgment. The plaintiff filed affidavits in support of his motion of persons who swore that the house had not been moved forward as alleged by the defendant, and some of whom deposed that the fence had been moved back, and had not been rebuilt on the old line. He also filed an affidavit of his solicitor's clerk saying that the testimony on the part of the defendant that the building had been moved had been a surprise to the solicitors and counsel in the case and to himself, that is, the clerk. The Divisional Court ordered a new trial on the ground of the discovery of new evidence, and the present appeal is from that judgment. The granting of a new trial is always a matter of discretion, and when granted ought not to be lightly interfered with by an appellate court. I am, however, with great respect, of opinion that this is a case in which we ought to interfere, being of opinion that there is no legal ground on which a new trial ought to have been granted. The real question of fact at the trial was whether the fence had been moved. The removal of the house was a collateral matter, affording at most an argument one way or other upon the main issue, and it is remarkable that although it was proved that the plaintiff himself was present and saw the re-building of the fence and made no objection, he did not come forward as a witness at the trial, nor did he make any affidavit in support of the motion for a new trial.

This reticence of the plaintiff both on the main issue and also as to the new evidence sought to be adduced, unexplained in any way as it is, is suspicious, and ought also, in my judgment, to have been fatal to his application; for his solicitor's clerk, while saying that the solicitor and counsel were taken by surprise, does not venture to say

Judgment. the same of the plaintiff himself. But that is not all.
MACLENNAN, The new evidence now sought to be adduced is not the
J.A. kind of evidence to which the rule on which the Court below has acted applies. No new fact or facts have been discovered. It is merely the case of new witnesses being discovered who could testify concerning facts upon which much evidence pro and con was given at the trial. The new witnesses would merely corroborate the testimony of those examined at the trial. I think the language of Wilde, J., in *Scott v. Scott*, 9 L. T. N. S. at p. 456, quoted by Harrison, C. J., in *McDermott v. Ireson*, 38 U. C. R. at p. 13, is entirely applicable to this case. That learned Judge said: "It has never been the habit in Westminster Hall to grant a new trial on the simple ground that the party could make the case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise there are few cases that would not be tried a second time." See also *Miller v. Confederation Life Insurance Co.*, 11 O. R. 120, 14 A. R. 218. For the reason, therefore, that there was no legal ground for the exercise of the discretion of granting a new trial, I think, with great respect, that we ought to allow the appeal and to restore the judgment of the learned Judge who tried the action.

I have said nothing about the counterclaim for an injunction against the plaintiff to restrain interference with the enjoyment by the defendant of the lane or alley lying to the north of the strip of land in question, because the defendant's success on that issue depends on the same evidence as on the main issue, and the same reasons apply for upholding the judgment on that part of the case.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal allowed with costs.

WOOD ET AL. V. REESOR ET AL.

Action—Election of Remedies—Inconsistent Remedies—Estoppel—Assignments and Preferences.

A creditor cannot take the benefit of the consideration for a transfer of goods and at the same time attack the transfer as fraudulent.

An assignee for the benefit of creditors has no higher right in this respect.

A creditor suing in the name of the assignee obtained judgment against third persons, for the payment to him as part of the debtor's estate of the proceeds of promissory notes given to the latter for part of the purchase money of his stock-in-trade :—

Held, that it was then too late for him to attack the sale as fraudulent.

Beemer v. Oliver, 10 A. R. 656, referred to.

On the argument of the appeal evidence as to the prior action was admitted, and on this evidence and objection then taken the judgment of FERGUSON, J., setting aside the sale, was reversed, without costs here or below.

THIS was an appeal by the defendants from the judgment of FERGUSON, J. Statement.

In February, 1891, the defendant Mrs. Vanzant and her son Clifford Vanzant, sold to the defendants George E. Reesor and Frank Vanzant, the stock-in-trade of a hardware and stove business in the village of Markham, and they received from the purchasers as part payment two promissory notes, dated the 16th of February, 1891, made by them by the name of Vanzant and Reesor, one payable one year after date for \$1,700, to the order of Clifford Vanzant, and the other for \$2,800, payable two years after date to the order of the defendant Mrs. Vanzant. Soon afterwards Frank Vanzant parted with his interest in the stock-in-trade and business to the defendant Reesor, and Clifford Vanzant transferred his interest in the notes to his mother.

In July and August, 1892, negotiations took place between the defendant George E. Reesor and Mrs. Vanzant for the resale of the business and stock-in-trade to the latter, and the sale was carried out in the month of August. As consideration therefor, Mrs. Vanzant paid Reesor \$1,000 in cash, gave him five promissory notes dated the 1st

Statement. of August for \$200 each, and also transferred to him the two notes above mentioned for \$2,800 and \$1,700.

Soon after this sale the defendant George E. Reesor transferred two of the \$200 notes to his brother Colin Reesor, and the other three to his father Samuel Reesor. At the time of the sale the defendant George E. Reesor was indebted to the plaintiffs, Wood, Vallance & Co., for goods bought from them, and the debt not being paid, they commenced this action on the 26th of September, 1892, against him and Mrs. Vanzant, for the recovery of the debt, and also to set aside the sale of the stock-in-trade as a fraud upon the defendant Reesor's creditors. Judgment was recovered by default on the 12th of October, 1892, against Reesor for the debt, amounting to \$2,107.77, and execution was issued therefor, but in the meantime, on the 3rd of October, 1892, he had made an assignment to the plaintiff A. S. Allan for the benefit of his creditors.

On the 4th of January, 1893, a statement of claim was filed against Mrs. Vanzant attacking the sale to her as fraudulent, and on the 11th of January, 1893, she filed her statement of defence, alleging, among other things, that she had given her co-defendant the five promissory notes already mentioned as part of the consideration for her purchase. Two days afterwards, on the 13th of January, 1893, the plaintiffs, Wood, Vallance & Co. obtained an order to continue the action in the name of the assignee Allan, for their own benefit, making him a co-plaintiff, and indemnifying him against costs; and they also, at the same time, obtained an order authorizing them as creditors of the defendant Reesor to commence proceedings in the name of the assignee, upon giving him an indemnity, against Colin Reesor and Samuel Reesor, but for their own exclusive benefit.

In pursuance of the first mentioned order the assignee Allan was thereupon added as a co-plaintiff in the present action, and in pursuance of the other order another action was immediately commenced on behalf of the plaintiffs, Wood, Vallance & Co., and by the same solicitors, but in

the name of the plaintiff Allan, against the debtor George E. Reesor, and Colin Reesor and Samuel Reesor, for the purpose of recovering the five promissory notes, or the proceeds thereof, on the ground that they also had been assigned to his co-defendants by the debtor George E. Reesor in fraud of his creditors. Statement.

Both of these actions were set down for trial at the Chancery Sittings in November, 1893, before FERGUSON, J., and the action respecting the promissory notes was tried first, and was decided in favour of the plaintiffs. The transfers of the notes to Samuel Reesor and Colin Reesor respectively, were declared to be fraudulent against the creditors of the defendant George E. Reesor, and were set aside, and it was adjudged that the plaintiffs should recover \$400 from Colin Reesor, and \$600 from Samuel Reesor, being the amount of the notes transferred to them respectively, together with the costs of the action.

Immediately after judgment in that action the present action was tried before the same learned Judge, the parties plaintiff and defendant being also represented respectively by the same counsel as in the other case. At the conclusion of the trial judgment was reserved, and was delivered on the 8th of January, 1894, declaring the sale to have been fraudulent against creditors, and setting it aside, and ordering Mrs. Vanzant to account to the plaintiffs for the proceeds of so much of the goods as had been sold.

From this judgment the present appeal was brought, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 19th and 20th of September, 1894.

On the appeal coming on for argument the appellants moved for leave to amend by setting up the proceedings and judgment in the other action as a bar, and it was proved that the other judgment had been satisfied by payment.

Moss, Q.C., and T. M. Higgins, for the appellants. The amendment should be allowed, and the evidence admitted,

Argument. so that the facts may be before the Court. None of the possible dangers sometimes spoken of in connection with the admission of evidence after judgment exist here. The facts are not in dispute, and appear of record in the other action. If admitted these facts at once dispose of this action. The plaintiffs are attempting to take inconsistent positions, and this they cannot do. They have elected to affirm the sale, and have obtained the benefit of it, and cannot now set it aside: *Beemer v. Oliver*, 10 A. R. 656; *Miller v. Hamlin*, 2 O. R. 103; *Ferguson v. Kenny*, 16 A. R. 276; *Clough v. London and North-Western R. W. Co.*, L. R. 7 Exch. 26; *Walton v. Simpson*, 6 O. R. 213. [The learned counsel then argued the case on the merits.]

McCarthy, Q. C., and *W. S. McBrayne*, for the respondents. It would be unjust to allow an amendment at this late stage. If it had been asked at the proper time the other action could have been dropped, and the plaintiffs would have received in this action payment in full: *Merchants' Bank v. Lucas*, 15 A. R. 573; *Ex parte Reddish*, 5 Ch. D. 882; *Ex parte Firth*, 19 Ch. D. 419. But there was in fact here no approbation of the sale. The plaintiffs are merely following assets that should be in their debtor's hands: *French v. French*, 6 D. M. & G. at p. 102. *Olliver v. King*, 8 D. M. & G. 110, is the converse case, and shews what is necessary. [The argument upon the other questions was then proceeded with.]

Moss, Q. C., in reply.

January 15th, 1895. HAGARTY, C. J. O. :—

Subject to our direction as to costs we have come to the conclusion that we should admit the evidence, and allow the true state of the case to be disclosed.

With this evidence before us I do not see how we can do otherwise than allow this appeal.

The impeached transaction with *Mrs. Vanzant* was and is good between the parties. It was void against creditors if they chose to impeach it, but they could certainly adopt

it if they thought proper as being voidable only ; and could elect to take any benefit derivable from it.

Judgment.

HAGARTY,
C.J.O.

These notes have their sole origin in the sale by Reesor. They are a considerable portion of the whole consideration. Reesor endorses them to members of his family who discount them, and obtain the proceeds.

The plaintiffs, in the assignee's name, elect to claim them as Reesor's property fraudulently transferred, and therefore recoverable under the statute. They succeed and obtain the proceeds of the notes, and take the moneys for their own benefit. They have thus reaped the benefit of the amount as part of Mrs. Vanzant's consideration for the Reesor property.

She would, of course, be liable to the bank discounting her notes, and her payment of them to the bank would be her loss, if the consideration, namely, Reesor's conveyance, was set aside.

But under what right, or pretence of right, Reesor's assignee could set aside the conveyance to her, and simultaneously claim and receive \$1,000 of the money she agreed to pay and did pay for it, I cannot understand.

Many cases have occurred in which sales of property—fraudulent as against creditors—have been set aside, yet negotiable notes given by the transferee, and endorsed to *bond fide* holders, have been enforced against him, though he has lost the property for which he gave the notes.

But I cannot believe that his assignee can *uno flatu* impeach the sale effectually, and receive the proceeds of the notes.

OSLER, J. A.:—[After stating the facts:]

The facts as to the other action are undisputed, and if they would constitute a defence to this action I am clearly of opinion that the evidence should be admitted on proper terms.

I may repeat what I said in the case of *Beemer v. Oliver*, 10 A. R. 656, at p. 662, not, of course, as authority, but as expressing my view of the law.

Judgment.

OSLER,
J.A.

The receipt of a dividend under an assignment which is void or voidable for any reason against creditors will estop the creditors who accept it from contesting the validity of the assignment, and creditors who accept either from a grantor or grantee the consideration for a conveyance fraudulent against creditors may thereby establish the deed and give it validity.

In such cases there is manifestly that sort of acquiescence on the part of those whose right it was to attack or object to the deed which makes it unjust for them afterwards to attempt to defeat it. They cannot take a benefit under it and at the same time assert that it is invalid. I refer also to *Adlum v. Yard*, 1 Rawle 163; *Norton v. Norton*, 5 Cush. 524; *Gray v. St. John*, 35 Ill. 222, 229; *Lanahan v. Latrobe*, 7 Md. 268; *Butler v. Hildreth*, 5 Metc. 49. In the latter case it was held by Shaw, C. J., that an assignee of an insolvent debtor might affirm a sale of goods made by the debtor for the purpose of delaying or defrauding his creditors and recover the price thereof from the vendee. There, the assignee knowing the facts, brought an action against the vendee on the notes given by him for the price of the goods, and secured the demand by an attachment on his property. It was held that he had thereby affirmed the sale.

Had these plaintiffs succeeded in obtaining in the other action possession of the notes given by Mrs. Vanzant to their judgment debtor George Reesor, or had they received payment of them from her, they would have come closely within the terms of the above proposition. They have not, however, done either of these things, but they have obtained the benefit of the new remedy given by the 8th section of the Assignments Act, and have recovered the proceeds of the notes received by the persons to whom they alleged that their debtor had wrongfully transferred them. The question is whether this and the fact that it was not in consequence of anything that was done by these plaintiffs that Mrs. Vanzant has been compelled to pay them makes any difference. I am of opinion that it does not, for the ques-

tion presented is not so much one of estoppel as of election : *Judgment.*
Scarf v. Jardine, 7 App. Cas. at p. 349 ; *Jones v. Carter*,
 15 M. & W. 718 ; *Clough v. London and North-Western*
R. W. Co., L. R. 7 Exch. 26, 34, 37. *OSLER,*
J.A.

Manifestly the plaintiffs are asserting, in these two actions, quite inconsistent positions.

In the one they attack the conveyance made by the judgment debtor to the defendant Catharine Vanzant. In the other they seek to recover from him, and from his transferees, the promissory notes which she had given as part of the consideration for the same conveyance. To assert a right to the notes, knowing as they did for what they were given, is to assert that they were some part of their judgment debtor's estate, choses in action belonging to him, which they were entitled to obtain, and enforce payment of from the defendant Vanzant.

As part of his estate they followed them into the hands of his transferees, and being unable by reason of a further transfer to obtain them in specie, they took, and enforced, judgment for their proceeds as fully and effectually, in the words of the 8th section, as the notes themselves, if still remaining in the possession and control of the persons to whom the defendant George Reesor transferred them, could have been seized or recovered. The foundation of that recovery is that the notes were part of their debtor's estate, and the effect of the two actions substantially is, that the creditors are asserting at the same time that the property sold by their debtor, as well as the consideration he received for it, are part of his estate and equally subject to satisfy their demand. They are at the same time approbating and reprobating the sale, and this, in my opinion, they cannot do. They were bound to elect what course they would take, and the recovery of judgment in the former action, or at all events the enforcement thereof, was a final act of election to affirm the sale to the defendant Vanzant. They can no more assert a right to adhere to both positions than the owner of goods wrongfully converted can sue the wrongful vendor for the price,

Judgment.

OSLER,
J.A.

and the vendee in trover for the goods themselves. Had the conveyance been finally set aside in this action before the recovery of judgment in an action for the notes, I think the defendants in the latter action would have been in a position to set up a similar defence, and to say that the notes, though transferred to them by George Reesor, were not really part of his estate, as he could not have compelled Mrs. Vanzant to pay them, because his creditors had elected to avoid the conveyance and had deprived her of the consideration for which they were given. For the same reason, she, having been compelled to pay by a *bond fide* holder, could recover back from him the amount so paid by her. And conversely, the plaintiffs having now received, with knowledge of the fact, part of the purchase money, as something which was the property of George Reesor, cannot be heard to say that the sale was void as against them. The fact that the notes had been endorsed by the transferees of the debtor to a third party, to whom the defendant Vanzant has been compelled to pay them, irrespective of anything done by these creditors, cannot make any difference, because they have in fact obtained the benefit of them from the debtor's estate, though in a less direct manner than if they had received payment from the defendant.

I am of opinion, therefore, that the motion to admit the evidence should be granted; that the facts now proved by it are a defence to the action, and that the appeal should be allowed, but without costs. The dismissal of the action should also be without costs, because the defendant might have raised the question at the trial where the large proportion of the costs were incurred, and the plaintiffs would then have had opportunity of determining whether to proceed with the trial, or to endeavour to recede from their position in the other action.

MACLENNAN, J. A. :—

[The learned Judge stated the facts as before set out, and continued:]

It is surprising that the application to admit further evidence was not made sooner, and to the learned trial Judge, at all events as soon as the plaintiffs had conclusively elected to enforce the other judgment by entering it up, which was on the 4th of December, 1893, and before judgment was pronounced in the present action. I see no reason, however, for refusing to grant the application now. It is not suggested that the new evidence could be answered or varied or qualified in any way, or that any inconvenience can be suffered by the respondents by reason of the motion not being made earlier, which cannot be compensated in costs; and, moreover, the plaintiffs no doubt had a right to elect at any time before judgment in the other action which of them they would proceed with. That being so, I think the amendment asked for should be allowed, and that the proceedings in the other action should be admitted as evidence on the appeal.

Judgment.

MACLENNAN,
J.A.

The question on the appeal then becomes this, whether, assuming that the sale of the stock to Mrs. Vanzant was fraudulent as against the plaintiffs, the latter can, after recovering as the property of the debtor the consideration he received for the sale of the goods, also proceed to recover for the satisfaction of their debt the goods themselves for which that consideration was given. I am of opinion that they cannot do so.

As between Mrs. Vanzant and Reesor the sale of the stock was perfectly legal and valid. It is, only as against creditors that it was otherwise. If they did not intervene, the goods remained the property of Mrs. Vanzant, and the cash and notes given therefor remained the property of Reesor. The creditors could either intervene or not, as they thought fit. If they chose to do so they could avoid the sale, and take the goods for their debts as the property of their debtor. In other words the effect of the statute is to make such a sale not absolutely void, but voidable merely at the instance and option of creditors. They can elect to affirm or disaffirm it: *Newnham v. Stevenson*, 10 C. B. 713; *S. C.* in appeal, 13 C. B. 302, 303,

Judgment. 304; *Clough v. London and North-Western R. W. Co.*, L. R. 7 Exch. 26, 34, *et seq.*; *Croft v. Lumley*, 6 H. L. C. at p. 705.
MACLENNAN,
J.A. If then the sale be good and lawful between the parties, when it is avoided at the instance of creditors, and the goods are taken away from the purchaser, the latter must have the right to receive back the consideration which he has given for the sale. The sale is declared to be void, and that means that the goods are still the goods of the vendor, and that the consideration which the purchaser has given has become his property again, and he can recover it back. The statute has given a person claiming through the vendor power to rescind the sale, and if that is done, the usual right of a purchaser in such cases must arise, to have back his purchase money, or whatever else he has given as consideration for the sale. The right is analogous to that of a purchaser who buys and pays for goods to a person selling them as his own goods, to recover back his purchase money on being deprived of them by a superior title: *Eichholz v. Bannister*, 17 C. B. N. S. 708; Addison's Law of Contracts, 9th ed., p. 544.

In the present case Mrs. Vanzant in her statement of defence states the consideration which she gave for the stock, and claims a return of that consideration in the event of the sale being avoided. As I have said it is entirely optional with the creditors, or the assignee in case of an assignment, to say whether they will avoid the sale or not. It may be for their interest, and they may prefer, to treat it as valid, and to take the consideration which has been given for it as their debtor's property, or they may prefer to treat it as invalid, and take the property itself, but I am clearly of opinion that they cannot do both. The cases above cited shew that it is not a question of estoppel but of election, and that when the election is once made it is final and irrevocable.

When, therefore, the sale in question was made, the creditors had the option either to treat it as valid and to take for the satisfaction of their debts the notes and money which Mrs. Vanzant had given the debtor for the goods,

or they could treat it as invalid and take the goods, but they could not do both. On the theory that the sale was invalid the notes which had been transferred to Colin Reesor and Samuel Reesor were Mrs. Vanzant's notes which she had a right to call upon George E. Reesor to get back and return to her. The plaintiffs have, with full knowledge that those notes were part of the consideration for the sale of the goods, treated them as their debtor's property, have sued for them, and recovered them as such. That judgment and recovery are founded on the fact that the notes were the property of the debtor, and in my opinion a conclusive affirmance of the validity of the transaction by which he acquired them. By that judgment they elected to treat the sale as valid, and could not afterwards proceed to set it aside. *Newnham v. Stevenson*, 10 C. B. 713, already referred to, shews that the mere commencement of an action which could be discontinued at any time is not in itself without more an election, but here the plaintiffs not only commenced their action but proceeded to judgment and have enforced it and have recovered property which they had no right to receive except by treating the sale as valid.

Judgment.
MACLENNAN,
J.A.

I therefore think that the plaintiffs having elected to affirm the sale the action should be dismissed. Insomuch however, as the defendants might have raised the present objection in the Court below by an application to the trial Judge while the case was standing for judgment, I think there should be no costs of the appeal or of the action below.

BURTON, J. A. :—

I agree.

Appeal allowed without costs.

BARNES V. DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION.

Fire Insurance—Interim Contract—Notice to Terminate—R. S. O. ch. 167, sec. 114 (19).

Upon an application for insurance for four years and the giving of his note for the premium, the applicant received an interim receipt providing among other things that the insurance was subject to the approval of the directors, who should have power to cancel the contract within fifty days by letter, and that unless the receipt was followed by a policy within fifty days the contract of insurance should wholly cease and determine. No notice of cancellation was given and no policy was issued :—

Held, per HAGARTY, C. J. O. That this was a contract of insurance that could be terminated only in accordance with the nineteenth statutory condition, and that at any rate there had been a waiver of the provision as to cessation of the risk.

Per BURTON and OSLER, JJ.A. That this was a mere incomplete or provisional contract of insurance for four years, and also an actual contract for fifty days, which came to an end by effluxion of time, and that the nineteenth statutory condition did not apply to the provisional contract.

Per MACLENNAN, J. A. That there was a contract of insurance, and that the provision for determination by effluxion of time was a variation from the statutory conditions, which was not binding, not being printed in the required mode.

In the result the judgment of the Queen's Bench Division, 25 O. R. 100, in favour of the insured, was affirmed.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 25 O. R. 100, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 4th of December, 1894.

Aylesworth, Q. C., for the appellants.

E. R. Cameron, for the respondent.

The facts are fully set out in the report of the case in the Court below, and the line of argument is also there sufficiently indicated, the following cases, in addition to those there mentioned, being cited: *Billington v. Provincial Ins. Co.*, 2 A. R. 158; *Citizens' Ins. Co. v. Parsons*, 7 App. Cas. 96; *Compton v. Mercantile Ins. Co.*, 27 Gr. 334; *McGeachie v. North American Life Assurance Co.*, 20 A. R. 187; *Manufacturers' Life Ins. Co. v. Gordon*, 20 A. R. 309; *Frank v. Sun Life Assurance Co.*, 20 A. R. 564.

January 15th, 1895. HAGARTY, C. J. O.:—

Judgment.

HAGARTY,
C.J.O.

This is an appeal from the Queen's Bench Division directing a new trial after the case had been dismissed at the trial before FALCONBRIDGE, J.

The learned Chief Justice of the Queen's Bench has set forth the facts very fully in his judgment, and they need not be repeated here.

I hold that the provisional receipt given to the plaintiff of January 13th, 1891, was on an application for a four years' insurance, and was not, as urged by the defendants, "at most an insurance for fifty days."

The conditions in this receipt must be read together. It provided for a power to cancel the contract within fifty days from date, "by causing a notice to that effect to be mailed to the applicant." That is the agreed on mode of cancelling the contract.

Then it provides that unless there be a policy within the fifty days the contract shall determine, and that the non-receipt of a policy within the time specified, *i.e.*, fifty days, is to be taken with or without notice as incontrovertible evidence of rejection by the board. These conditions are not very consistent. The only mode provided for cancelling the contract is within the fifty days by notice mailed to the applicant.

Then comes the provision that unless there be a policy within fifty days the contract is to cease. So, without any notice of cancelling the contract, the non-execution of a policy, intentional or accidental, is to discharge all liability. And the mere non-receipt of a policy within the time, with or without notice, is absolutely to prove rejection that may never have taken place. Then, the applicant gets no notice whatever within the agreed on time. The time expires on the 4th of March.

Most men might suppose that in the absence of hearing from the company that his insurance was in force, especially with the knowledge that they held his note for the premium not due for nearly two months. He would be

Judgment.

HAGARTY,
C.J.O.

very strongly confirmed in this belief by receiving the letter of the 17th of April, calling his attention to the note maturing on the 1st of May, and requesting prompt payment.

In making this application for payment is the company treating it as a cancelled contract, or as one which they treat as still in existence?

He remits the money to the company on this notice, and it appears entered in their books on the 23rd of April. On the date of the 18th of April, but not received at the applicant's post office till the 22nd of April, the manager writes to him returning his short date note, and informing him that "the board have decided not to receive the application."

So this cancellation did not take place till the 18th of April, a month after the fifty days had expired.

These conditions as to the fifty days could, I presume, be either insisted on or waived by the company. They could treat the contract as avoided by the lapse of the specific time, or as only voidable in their option, and their intention not to treat it as void may be inferred from their actions.

The loss occurred on April 24th, the day after the applicant's money, sent at their request and demand, was entered in their books. It is true that the manager's letter enclosing the short date note reached the applicant's post office on April 22nd.

Assuming that the applicant actually received the letter on the 22nd or 23rd of April, he would certainly be in a very unpleasant position if he was to understand that his insurance with the defendants was at an end. The loss was sustained a day or a day and a half after this notice to him.

Some days after the fire, and with knowledge thereof, the manager writes again to the applicant returning to him the money sent and entered in their books on the 23rd of April.

Barnes sent this money back to the company and the

manager again wrote to him stating that there was no insurance in force "since the expiry of your provisional receipt on 3rd March last."

Judgment.
HAGARTY,
C.J.O.

I am not prepared to agree with the learned trial Judge in his ruling and dismissal of the action. Various defences were pleaded by the company but were not gone into. I think there was evidence of the company treating this as an existing insurance long after the expiration of the fifty days. They do not assert any cancellation of the contract earlier than a fortnight after that period. If no fire had occurred they could have continued the insurance and retained the money sent to them.

I agree with the learned Chief Justice as to his application of the Ontario Insurance Act, R. S. O. ch. 167, to this case, and think that the appeal should be dismissed.

BURTON, J. A. :—

I think that the learned Judge of first instance was right in declining to submit this case to the jury.

The contract between the parties is evidenced by the application and interim receipt.

The terms of the contract are set forth in the receipt in these words:

"Received from B. Barnes, post office, Parkhill, an undertaking for the sum of \$46.50, being the premium for an insurance to the extent of fifteen hundred dollars, on the property described in his application of this date numbered 16. Subject, however, to the approval of the board of directors, who shall have power to cancel this contract at any time within fifty days from this date, by causing a notice to that effect to be mailed to the applicant at the above post office. And it is hereby mutually agreed that unless this receipt be followed by a policy within the said fifty days from this date, the contract of insurance shall wholly cease and determine, and all liability on the part of the association shall be at an end.

"The non-receipt by the applicant of a policy within the

Judgment.

BURTON,
J.A.

time specified is to be taken with or without notice as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said board of directors. In either event the premium will be returned on application to the local agent issuing this receipt less the proportion chargeable for the time during which the said property was insured." And in the margin of this receipt were written the following words: "paid per note on above \$14.25; agent's fee, \$1; January 13th, 1891."

This, I take it, beyond all question bound the company for the full period of fifty days, unless terminated by the company as provided by the contract; and I do not for a moment question that if the fire had occurred within that time, and before the plaintiff had been notified, they might have been held liable.

Here the fire did not occur until after the expiry of the fifty days, and the agreement further provided that unless the receipt was followed by a policy within that period the insurance should wholly cease and determine, and all liability on the part of the defendants be at an end.

The contract then provided that the non-receipt of a policy within the period should be incontrovertible evidence of the rejection of the application.

There is nothing illegal or unfair in such a contract, and it is not pretended that there was any misrepresentation to the assured when he signed it.

It cannot be successfully contended that this constituted a contract for the full term of four years—such a contract would have been beyond the power of the agent to grant—and it speaks for itself.

It consists of two parts:

1st. The application for an insurance for four years:—That was a proposition for insurance not binding upon the company until accepted, and possibly not even then until notified to the plaintiff, but certainly not till accepted, and he until that time had a *locus penitentiæ* and might have declined to proceed with it. No valid or binding contract was concluded until then as to the full term of insurance.

As to the fifty days' insurance : that remained in full force until the defendants notified the plaintiff that they had declined the application, or until it expired by effluxion of time.

Judgment.
BURROW,
J.A.

The Divisional Court has proceeded, as I understand the decision, upon this ground. They say this interim receipt is subject to the provisions of the Act in reference to statutory conditions. It may be conceded that the interim insurance was subject to the company's own conditions as varied in the manner pointed out in the statute, or to the statutory conditions, and, in the absence of any evidence on the subject, to the latter, and it is contended that the omission to give notice that the insurance would terminate at the end of the fifty days is within the meaning of subsection 19 of section 114 of The Ontario Insurance Act, R. S. O. ch. 167. But this must surely be a fallacy. It may well be, I do not say it is so, but it may be that a notice to terminate given within fifty days might not be valid unless given in compliance with that section, but if the construction is valid it would be equally necessary in the case of an ordinary policy. There was nothing necessary here any more than in an ordinary policy to put an end to the contract by notice ; in both cases it expired by effluxion of time.

Under these circumstances I have not thought it necessary to consider the other questions, but it is due, I think, to the manager of the company to say that we have not had the opportunity of hearing his version of what occurred in reference to the release.

I am dealing with a pure question of law and think the judgment of the trial Judge should not have been interfered with, and that this appeal should be allowed.

That a mistake of a clerk in the office in sending out a notice demanding payment of the small note after the risk had been declined could possibly make the company liable as on a contract of insurance appears to me so utterly frivolous that I am surprised at its being urged and have not thought it worth while to refer to it in my judgment.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

The testator applied for an insurance with the defendants for a term of four years, from the 13th of January, 1891. The application was made to a local agent of the defendants, and the applicant thereby acknowledged under his hand, that only the officers of the company at the home office had authority to determine whether or not a policy should be issued on the application. At the same time the applicant gave an undertaking by which, after reciting that he was desirous of becoming a member of the defendant association for four years from the date thereof, he agreed to hold himself liable to pay to them at such time and in such manner as the directors might determine such amounts as might be required from time to time, not exceeding in any case \$46.50. Upon this undertaking is endorsed by the local agent a receipt for \$15.25, by note, payable on the 1st of May, 1891. Thereupon the agent gave the applicant a document described as a provisional receipt, and the question is what is the contract evidenced thereby. The plaintiff contends that it is a contract of insurance for four years, and, as such, that it could be terminated only in the manner prescribed by the 19th statutory condition set forth in section 114 of the Ontario Insurance Act, R. S. O. ch. 167. The contract of insurance for four years which the plaintiff's testator applied for was, however, one based upon his being accepted by the directors of the association as a member, and evidenced by their acceptance of his application and the issue of a policy of insurance in pursuance thereof. His application was subject to the approval of the board, and it was for them to determine, as he himself admits, whether or not a policy should issue upon it. The contract may be said, perhaps, to be provisionally one for four years, with a stipulation for an actual insurance for fifty days pending the acceptance or refusal by the company of the application.

I think no higher effect can be given to it unless we are

prepared to hold that the testator was in the same position immediately after the receipt was given to him as he would have been if the receipt had been followed by a policy. The 114th section, and the 19th condition, refer not to an incomplete and inchoate or provisional contract of insurance, but to one, which, for the time expressed therein, is in point of law as actual and complete a contract as if evidenced by a policy. As regards the incomplete and inchoate contract, I think there is no reason why it may not be stipulated that it shall be deemed as rejected by the board if a policy is not issued within the stipulated time; the condition cannot apply to that; while as regards the other, which is an actual insurance for fifty days, the 19th condition may well apply, so that if the directors desire to determine it sooner they must do so in the manner prescribed by the condition. The instruments we have to construe are business documents, framed loosely and inaccurately enough, but we should, with all respect, be straining their meaning and utterly disregarding the usual course of business of these insurance companies were we to hold that a preliminary agreement for insurance, such as they disclose, can only be terminated in the manner prescribed by the 19th condition. The manner in which the option of the company to accept or decline the proposal may be shewn, may, in my opinion, be stipulated for just as it has been by the provisional receipt in this case, wholly unembarrassed by the condition referred to. This being so the insurance came wholly to an end by the terms of the receipt on the 4th of March. From thence until the time when Barnes received the letter of the 17th of April, he had no reason to suppose himself insured as may well be inferred from the promptness with which he took advantage of that letter by remitting the amount of the note nearly a fortnight before it would be due. I cannot regard a mere routine or office letter of that kind, or the subsequent action of the company in formally declining the application, as establishing against them the fact of an existing insurance, nor, with all respect, is there any

Judgment.

OSLER,
J.A.

Judgment. tangible evidence whatever that the company had issued
OSLER, a policy, a complete policy, upon the application. I am
J.A. obliged to say, therefore, that in my opinion the judgment
of the trial Judge should be restored.

MACLENNAN, J. A. :—

I think that this appeal should be dismissed. The facts are very fully stated in the judgment appealed from. It was not contended that the plaintiff's testator was not insured at all by virtue of the documents which passed between him and the company; but the contention was that under the stipulation in the provisional receipt the insurance was cancelled and terminated by the mere non-delivery of a policy within fifty days. The judgment appealed from decided that it was not so cancelled or determined, and I am of that opinion. The undertaking is distinctly expressed to be for an insurance for four years, and the receipt expresses it to be subject to the approval of the board of directors, who shall have power to cancel the contract within fifty days from date by causing a notice to that effect to be mailed to the applicant at his post office. If the provisional receipt had stopped there, there could be no doubt that the insurance was for four years, subject to cancellation. Then what is the effect of the remainder of the receipt? What it says is, not that the insurance by virtue of the provisional receipt is to be for fifty days and no longer, but that unless the receipt is followed by a policy within fifty days, the contract of insurance shall cease and determine, and all liability of the company shall be at an end, and that the non-receipt of the policy within that time is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of the contract by the company, and in either event the premium will be returned on application less the proportion chargeable for the time during which the property has been insured.

Now, I think the meaning of that plainly is that it is

an alternative method of putting an end to the insurance. Judgment.
To my mind the stipulation that in either event the pre- MAULENNAN,
mium is to be returned less the proportion for the time J.A.
during which the insurance has continued, can mean nothing
else. If that is so, then in order to be valid this alterna-
tive condition ought to have complied with section 115 of
the Ontario Insurance Act, R. S. O. ch. 167, as a variation
of the statutory conditions and to have been printed in
different ink. No doubt but for the statute the condition
would have been good, and if section 115 had been com-
plied with the Court might have held it to be reasonable
and valid. As it is, however, I am constrained to agree
with the judgment that it is an invalid condition, and that
the non-delivery of the policy within the fifty days was of
no effect. That being so, the insurance was not legally
terminated before the occurrence of the fire, and the judg-
ment should be affirmed. It is to be observed that the
statutory conditions are made applicable not merely to
policies of insurance, but to all contracts of insurance.
That being so, I think it impossible for us to say that they
are not applicable in this case.

*The Court being divided in opinion,
the appeal was dismissed with costs.*

BOND V. TORONTO RAILWAY COMPANY.

Master and Servant—Workmen's Compensation for Injuries Act—Street Railway Cars—Defect in Arrangement of Plant—Negligence—55 Vict. ch. 30, sec. 3 (O.).

Having car buffers of different heights, so that in coupling the buffers over-lap and afford no protection to the person effecting the coupling, is a "defect in the arrangement of the plant" within the meaning of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30, sec. 3 (O.).

Judgment of the Queen's Bench Division affirmed, BURTON, J.A., dissenting.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division.

The plaintiff was a motorman in the employment of the defendants, and brought the action under the Workmen's Compensation for Injuries Act to recover damages for injuries sustained by him when coupling cars. The accident happened at the end of the line on Queen street west, Toronto, where there is a steep incline. The "trailer" was standing at the foot of the incline, and the conductor took charge of the motor to back it down to the trailer to have the coupling made. At the end of the motor and of the trailer was a wooden projection or buffer of about four inches, but the cars were not of equal height from the ground and the projections and couplers over-lapped when the cars were brought together. The motor was run down too quickly, and the plaintiff, who was standing between the cars, was injured.

The action was tried at Toronto on the 18th of January, 1894, before STREET, J., and a jury, when judgment was entered in the plaintiff's favour for \$500 and costs on the following questions and answers:—

"Was the injury to the plaintiff caused by any negligence on the part of the defendants? Yes.

"If it was, did such negligence consist in the alleged defect in the buffers at the end of the cars? Yes. Or did it consist in the alleged negligence of the conductor? No. Or in both? No.

" Was it the duty of the conductor, or was it the duty of the plaintiff to do the coupling at the time of the accident ?
Either. Statement.

" If you find the plaintiff entitled to damages, at what sum do you assess them ? \$500."

One of the officers of the company stated at the trial that the wooden projections were not intended to protect the men when coupling but only to prevent injury to the light wood-work at the ends of the cars when the cars were placed close together in the sheds. It was shewn that the cars used by the company were of different sizes and heights, and that different trailers were from time to time used with different motors. The plaintiff knew before the accident happened that the projections were of different heights and gave no notice and made no complaint.

The judgment of STREET, J., was affirmed by the Queen's Bench Division, and the defendants' appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 3rd and 4th of December, 1894.

J. Bicknell, for the appellants. It is clearly shewn that had it not been for the speed of the motor car the accident would not have happened, and that the proximate cause of the accident was allowing the car to run too quickly down the incline. It is also clear that the plaintiff would have been squeezed between the cars in the eight inches of space which would have been left if the alleged buffers had met. There was no duty imposed upon the defendants to provide their cars with buffers for the protection of the workmen when coupling. It was not shewn that such buffers were usual appliances placed upon cars for the protection of workmen, or that ordinary care required buffers to be placed thereon for that purpose: *Black v. Ontario Wheel Co.*, 19 O. R. 578; *Wood on Railroads* (Minor's ed.), sec. 379; *Kite v. London Tramway Co.*, noted in *Bridges v. Ontario Rolling Mills Co.*, 19 O. R. at

Argument. p. 737. Even if the want of proper buffers was negligence and was the cause of the injury to the plaintiff the defendants can only be made liable if there was a defect in the arrangement of the plant which arose from the negligence of some person in their service who was entrusted with the duty of seeing that the arrangement of the plant was proper and if that person after notice of the defect neglected or refused to remedy it. But no such defect in arrangement could have existed before the morning of the day upon which the accident happened, when the two cars were coupled together, and it is not shewn that any defect in arrangement was caused by any person who was in the service of the defendants and who was entrusted with the duty of seeing that the arrangement was proper; and it is shewn that the plaintiff had full knowledge of the defective arrangement but failed to give notice thereof, so that he is not entitled to recover under the Workmen's Compensation for Injuries Act, 1892. Besides the plaintiff was not justified in doing the work at all.

John McGregor, and R. G. Smyth, for the respondent. To leave the cars without proper buffers to protect the workmen whose duty it was to couple them, and with couplings that did not meet, was a defect in the arrangement of the plant, and this defect was known to the company. Where the defect is known both to the employer and to the workman, there is no necessity to notify the employer. The plaintiff was acting under the orders of the conductor, and was obliged to make the coupling.

J. Bicknell, in reply.

January 15th, 1895. HAGARTY, C. J. O.:—

I can see nothing in the point made much of at the trial, that the plaintiff as motorman had no business to do the coupling or leave his motor. I think it was satisfactorily shewn that this was constantly done just as the conductor and he arranged between them. His evidence

on this was fully corroborated by others who worked on the railway, motormen and conductors. The conductor is said to be in general command of the car. When the accident occurred the current was cut off.

Judgment.

HAGARTY,
C.J.O.

The case was very fully and carefully explained to the jury by my learned brother Street, and they found as above.

We can read their findings in substance as meaning that there was no sufficient protection by buffers or otherwise against the contingency of the ends of the cars coming rapidly together while one of the company's servants was engaged in a necessary duty, and while in performing such duty he had to put himself in a position of danger. Now his missing the coupling may be, and in this case was, chiefly caused by the couplings not coming fairly together, but the one passing over or under the other.

I think that the defendants were fully aware of the state of the so-called buffers and of the couplings, and also that the car and trailers were not usually on the same level.

I am not prepared to hold that when a railway company in the daily carrying on of their work have to bring cars together for coupling and uncoupling, and also require their servants necessarily to go into the narrow space between the two cars to be coupled, they are not bound to take reasonable precautions to prevent just such an accident as occurred here either by adequate buffers or bumpers for the protection of their servants in doing their required work. If they had it so provided that the one coupling would not from the difference in level over or under-lap its opposite, it would obviate much of the danger to arise from missing the connection.

I presume all this would come under the head of "arrangement of plant."

I cannot see my way to interfering, and the appeal must be dismissed.

OSLER, and MACLENNAN, J.J.A., concurred.

Judgment. BURTON, J. A. :—

BURTON,
J.A.

The learned Judge intimated at the trial that there was no case against the defendants at common law, a view apparently acquiesced in by all parties, and the defendants on the other hand adopted the finding of the jury that there was no negligence on the part of the conductor who was holding the brake at the time of the accident.

The question, therefore, seems to resolve itself into whether there was evidence that the injury was caused by reason of a defect in the condition of the car known to the defendants, or which though known to the plaintiff he failed to inform his employers of.

It is, I take it, clear that at common law or under the statute the employer is not bound to supply the very latest or most improved machinery or appliances: *Walsh v. Whiteley*, 21 Q. B. D. 371; *Butler v. Birnbaum*, 7 Times L. R. 287.

The coupling of railway cars is a hazardous business, but it by no means follows that an employer is liable simply for the reason that the accident might have been prevented by some special device or precaution not in common use, and the necessity for which would probably never have arisen if the servant had not stepped out of the line of his duty to couple them when in motion. A passage from a recent work so concisely explains my own view that I cannot forbear quoting it: "All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter, for reasonably safe in such connection means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences not of danger but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business, and however strongly they may be con-

vinced that there is a better or less dangerous way no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall in effect dictate the custom or control the business of the community." See also the judgment of this Court in *London v. Goldsmith*, 16 S. C. R. 231, and in *Delaware River Ironship Building Works v. Nuttall*, 119 Pa. St. 149, the principle is thus stated: "The test is general use. Tried by this test, the saw of the defendant is such an one as the company had a right to use, because it is such as is commonly used by mill-owners; and it was error to leave to the jury any question of negligence based on the failure to provide a spreader"—although the spreader there would have prevented the accident.

Judgment.

Buxton,
J.A.

So where a passenger slipped under a gangway rail of a steamboat and was drowned, and it appeared that all the boats on Lake Champlain were constructed in the same manner, and had been so run for many years, and there was no proof tending to shew that any one had ever before gone overboard in that way, it was held that the plaintiff was properly nonsuited, the holding being upon the principle that where machinery or appliances not being out of repair have proved adequately sufficient, and after long continued use no accident or injury has occurred, the master cannot be charged with negligence in continuing their use upon the ground that an accident ultimately did happen which might have been prevented if other safeguards had been provided: *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1; see also *Loftus v. Union Ferry Co.*, 84 N. Y. 455, and *Burke v. Witherbee*, 98 N. Y. 562.

Before leaving this question of the liability at common law: I have already referred to the position being dangerous under any circumstances, but there was no change after the plaintiff entered upon the employment, and I think the position of parties under such circumstances is no where

Judgment.
BURTON,
J.A.

better expressed than in a judgment of Lord Esher, in *Griffiths v. London and St. Katharine Docks Co.*, 13 Q. B. D. at p. 260: "Now where it is an action by a servant against his master for the wrongful condition of machinery on the premises on which the servant is to act, or of the condition of the means by which the services of the servant are to be fulfilled, if the servant confines the allegations in his statement of claim to alleging the existence of danger in any of these things, owing to the negligence of the master, he shews no cause of action. If the danger is one which was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary that these two things should exist in order to form a *prima facie* cause of action it is necessary that they should be shewn to exist in the statement of claim." And Lord Justice Bowen in confirming that view, adds: "The old form of declaration must have shewn ignorance on the part of the servant." In the one case the statement of claim would be bad on demurrer, and the absence of proof would be ground for nonsuit. This then was law so completely settled and established as to be indisputable, and where the servant enters upon any dangerous employment he is presumed in law to have knowledge of it, a presumption which must be rebutted before any cause of action arises. In such a case no cause of action being shewn there would be nothing to leave to the jury.

That being the state of things at common law, how does the case stand under the Act? Although in many respects the master's liability is increased under it, so far from affecting his position adversely in the matter now in question, in one important respect the master's position is made stronger than it is at common law as the workman has no right to compensation for injuries caused by reason of any defect where he knows of the defect and fails within a reasonable time to give information thereof to his employer.

The charge, so far as I can understand it from the statement of claim, striking out all about the plaintiff's conform-

Judgment.

BURTON,
J.A.

ing to orders, of which there was no evidence, consisted in the construction of the cars and the buffers upon them, the said buffers not meeting so as to prevent the ends of the cars from jamming and causing injury to the plaintiff.

There is a remarkable lack of evidence here to shew that buffers were used on other roads, or that they could safely be made so as not to interfere with the coupler in the performance of his duties. It is shewn that on this particular occasion one of the cars was a little higher than the other, but whether generally so or not is not shewn, and that would not interfere with the coupling itself, as the coupling bars work upon a swivel so that they can move not only laterally but are so flexible that they can move up and down, so that as appears by the evidence in this respect it makes no difference whether there is a thirty-three inch wheel on one car and a thirty inch wheel on the other. Whether or not the one buffer passed over the other from the difference in the heights of the two cars is not very clearly established, but is left to be inferred.

Whether the buffers could have been so constructed as to prevent the accident I do not know, but it is, I think, clear that they were not put where they are found for any such purpose, and that in that particular place they could not be much enlarged without interfering with the coupling.

The plaintiff makes a statement which, with great respect, I think was not evidence, that he supposes that the buffers were put there for safety. This was an expression of opinion, a mere guess. He had no knowledge on the subject, and he guessed wrong—as is shewn by the parties who made the changes in the cars; but even if he had guessed right, he who was constantly using them thought there was nothing wrong with them.

Another witness for the plaintiff describes the defect to be that one buffer went over the other, but he states, as the plaintiff also states, that he is sure that if the motor car had been let down slowly to the trailer the accident would not have occurred. The company had, I think, a right to expect that the coupling would be effected when one of the cars was moving slowly towards the other, and

Judgment. if this reasonable precaution had been taken, in my judgment the accident would not have occurred.
BURTON,
J.A.

It is proved on the other hand that these buffers were placed where they are for a totally different purpose. On the conversion of the cars into electric cars the dashboards were cut in the centre to make a passage way for the servants of the company from one car to the other, and the pieces of wood called buffers were placed immediately under this cutting to enable them to pass safely, and also as a protection to the canopies over the ends of the cars.

It was proved that the company had 500 of these couplers in use on their road in Cleveland ; that it was in very general use, and that only one accident had happened to a coupler, and the particulars of that accident were not proved, nor was it shewn that it arose from the want of a buffer.

It is stated that the learned Chief Justice of the Queen's Bench held that this was a defect, and that there was clear evidence of notice to the company, because the manager stated in his evidence that they were placed there not to protect the workman, but for another purpose. If so, I think with great respect, that he exceeded his function, which was to give judgment upon the findings of the jury, and not to find facts himself. But assuming that I am wrong in this respect, is this a fair or a reasonable inference to draw ? It is not shewn that he was aware that cars of a different height were coupled, or that the buffers had ever over-lapped ; and the same witness further swears that he did not think the buffers, even if they met, would be any protection to a man between the cars.

What evidence was there shewn here proper to submit to the jury of negligence on the part of these defendants ? I am free to admit that if I had been trying the case without a jury, I should have found it difficult to say, upon this evidence, that they were guilty of any negligence, and I am still in doubt whether any buffers could be made which would not interfere with the coupler's duties, and render the operation still more dangerous.

Lord Bramwell once said : Here is a contract made by a fishmonger and a carrier of fish, who know their business,

and whether it is just and reasonable is to be settled by me who am neither a fishmonger nor a carrier, nor with any knowledge of their business. I plead a similar want of knowledge as to running a street railway, and the nature of the appliances to be used for safety.

Judgment.

BURTON,
J.A.

The jury probably were not aware that if they had found the conductor guilty of negligence that would have rendered the defendants liable. I think I should not have found the same way, and that to it and the carelessness of the plaintiff, this accident is attributable, and that there was no evidence for the jury upon that branch of the case which imputes negligence to the defendants.

But what is to be said of the plaintiff who was in the constant practice of coupling, if he thought there was this defect, and yet omitted to give notice to the defendants? Why should we presume that the officials of the defendants should know that one car was sometimes higher than the other, and that there was danger in consequence, when the plaintiff himself says that he never noticed there was anything wrong?

It is sometimes said that negligence is a question of fact for the jury, and that an appellate court should not interfere. Although that is a very common observation, and in a sense true, it is not an accurate definition. The facts alleged to constitute negligence are for the jury; the inferences to be drawn from these facts are for the court. If persons competent to give their opinion had shewn that buffers could be affixed which would have prevented accidents without interfering with the coupling, and were generally in use on other roads, or that accidents had been frequent or had even once happened on this road from the same cause, or that complaints had been made to the officials, I should have held that, whether I agreed or disagreed with the conclusions of the jury, it was their province to deal with it, and I should have no right to interfere. But I have no more right than the jury have without evidence to set up a standard which shall in effect dictate to this company what devices they shall adopt for the secure working of their line.

Judgment.

BURTON,
J.A.

I refer to *Crafter v. Metropolitan R. W. Co.*, L. R. 1 C. P. 300, and especially to the remarks of Montague Smith, J., in support of the view that there was no evidence for the jury in this case.

There, as here, the learned Judge at the trial—the learned Chief Justice Erle—declined to stop the case, but in *banc* he held with his brother Judges that there was no evidence proper to submit to the jury, and there, as here, the Court held that the opinions even of builders was not the kind of evidence to fix the defendants with negligence, and the late Mr. Justice Willes uses almost the same language as I have used above, that it looked like an attempt to dictate to the company as to how they should manage their business. And Mr. Justice Montague Smith, whilst admitting that it is sometimes difficult to draw the line, adds, but it must be drawn between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and properly to be left to a jury, and he adds that the supposed defects were obvious to every one and well-known to the plaintiff himself, describing evidence such as we have here as a mere expression of opinion.

I think the evidence falls very short of what is necessary to fix the defendants with notice of any defect, and also of the ignorance of the plaintiff if what is complained of was a defect. I must not be understood as saying that after what has occurred the defendants would be absolved from responsibility if an injury occurred from the same cause without any effort to remedy the alleged defect, but it is easy to be wise after the event, and I adhere to what I have said as to the masters not being liable as insurers for mere accidents or the carelessness of their servants. I refer to *Toomey v. London, Brighton and South Coast R. W. Co.*, 3 C. B. N. S. 146; *Cornman v. Eastern Counties R. W. Co.*, 4 H. & N. 781.

I am of opinion that the action should be dismissed.

Appeal dismissed with costs,
BURTON, J. A., *dissenting.*

ARTHUR V. GRAND TRUNK RAILWAY COMPANY
OF CANADA.

*Water and Watercourses—Surface Water—Diversion of Watercourse—
Railways—Arbitration and Award—Damages—Injunction—Continuing
Damage.*

If water precipitated from the clouds in the form of rain or snow forms for itself a visible course or channel and is of sufficient volume to be serviceable to the persons through, or along, whose lands it flows, it is a watercourse, and for its diversion an action will lie.

Beer v. Stroud, 19 O. R. 10, considered.

Where such a watercourse has been diverted by a railway company in constructing their line without filing maps or giving notice the landowner injuriously affected has a right of action and is not limited to an arbitration.

For such diversion the landowner, in the absence of an undertaking by the company to restore the watercourse to its original condition, is entitled to have the damages assessed as for a permanent injury.

The mode of computing damages to be allowed in lieu of an injunction, considered.

Judgment of the Queen's Bench Division, 25 O. R. 37, affirmed.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 25 O. R. 37, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 27th and 28th of November, 1894. Statement.

Osler, Q. C., for the appellants.

Clute, Q. C., and *J. W. Gordon*, for the respondent.

The facts are stated in the report of the case in the Court below, and the line of argument is there indicated. The following cases, in addition to those there mentioned, were cited: as to the plaintiff's remedy being by arbitration: *New Westminster v. Brighthouse*, 20 S. C. R. 520; *North Shore R. W. Co. v. Pion*, 14 App. Cas. 612; as to the question of "watercourse": *Morrissey v. Chicago, etc. R. W. Co.*, 58 Am. & Eng. R. W. Cas. 622; *Hill v. Cincinnati, etc. R. W. Co.*, 29 Am. & Eng. R. W. Cas. 502; *Chamberlin v. Baltimore, etc. R. W. Co.*, 29 Am. & Eng. R. W. Cas. 533; *Chicago, etc. R. W. Co. v. Benson*, 20 Am. & Eng. R. W. Cas. 96.

Judgment. January 15th, 1895. HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.

I have examined the evidence on either side produced at the trial, and I am of opinion that the learned Judge was right in submitting the disputed question of fact to the jury, as to the existence or non-existence of the alleged watercourse claimed by the plaintiff and obstructed or stopped by the defendants' railway. I am not prepared to hold that there was any misdirection or non-direction in the charge reported to us sufficient to warrant our interference.

The learned Judge directed the jury in the language used in the case of *Beer v. Stroud*, 19 O. R. 10. The facts of that case were, perhaps rather stronger in the plaintiff's favour than in the present, but the general rule of law there expressed as to what constitutes a watercourse was fully given to the jury. Unless we find that rule of law incorrect, we must treat the case as one simply of fact to be decided by the jury. I do not think that the defendants can justly complain of the charge or its statement of the law. The jury on that might properly have found against the plaintiff if they were of opinion on the evidence that there was no defined channel course or banks where the water flowed—in other words, that “there was not a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel” constituting a watercourse. I use the language of *Beer v. Stroud*.

The late case of *Bunting v. Hicks*, 7 R. (Aug.) 53, notices the general law as to surface and spring water. Previous authorities are referred to in these cases, and in our own Courts we may refer to *McGillivray v. Millin*, 27 U. C. R. 62; *Crewson v. Grand Trunk R. W. Co.*, *ib.* 68: see also a large collection of American authorities in *Morrissey v. Chicago, etc., R. W. Co.*, 58 Am. & Eng. R. W. Cas. 622.

I cannot see any definition to be properly given to a jury of a watercourse than has been here presented to them. There was evidence proper to be submitted to them.

The injury to the plaintiff was, I think, proved with reasonable certainty, arising from the construction of the new railway track instead of the old.

Judgment.

HAGARTY,
C.J.O.

I do not think that from anything appearing in the case the defendants are in a position to defeat the action by insisting on arbitration as the only remedy. The defence is not guilty by statute, and the references are: C. S. C. ch. 66, sec. 83, and 51 Vict. ch. 29, sec. 287 (D.). These sections are merely as to the times within which suits "for any damage sustained by reason of the railway" are to be brought. The damage here was caused by the recent change of the line of railway from the original line it followed for many years, and I do not think the defendants were in a position, on the evidence before the Court, to claim any right (if any exist) to insist on arbitration as the plaintiff's only remedy. He prays alternatively in his claim for a mandamus to the defendants to take the proper proceedings to ascertain the amount of compensation. I do not discuss the question whether this kind of injury, not on the plaintiff's land, is a proper subject for compulsory arbitration.

It is further objected that the plaintiff can only recover for twelve months' damage. The injury (if any) is certainly a continuing injury caused by the permanent erection of a line of railway, not an intermittent act, but an injury sustained once for all, to persons or property.

On the general merits of the case on the evidence, the view taken by the jury may not be such as will commend itself to all minds. But I hardly see our way to interfere.

OSLER, J. A. :—

I think the judgment should be affirmed. There was evidence on which the jury might properly find, as they have done, that there was in fact an actual watercourse as distinguished from a mere casual and undefined flow of surface-water, and if there was any over-statement in the charge of the learned trial Judge as to what might be

Judgment.

OSLER,
J.A.

sufficient to constitute a natural watercourse in law, the diversion of which might give rise to a cause of action, I think it was such as not to be likely to mislead the jury in dealing with the evidence as a whole. If, in short, there was misdirection no substantial wrong or miscarriage has been occasioned thereby, and it thus becomes unnecessary to review the case of *Beer v. Stroud*, 19 O. R. 10, as the appellants have invited us to do. *Bunting v. Hicks*, 7 R. (Aug.) 53, discusses the point dealt with in that case.

The defendants having diverted the watercourse in constructing the deviation of their line, the plaintiff was clearly entitled to some remedy, and he brought this action. The defendants have not pleaded that his remedy was by arbitration under the provisions of the Railway Act, and though they said so at the trial it was not in fact proved that they had taken the requisite steps under the Railway Act by filing maps and plans, or giving notice, to put the matter of the plaintiff's claim in train for ascertainment by means of proceedings for compensation. The case was fought out at the trial, and evidence given on both sides as to the plaintiff's actual damage by the diversion of the stream. The defendants now propose that the verdict shall be limited to \$12, the amount found by the jury as damages for the diversion of the stream for six months, and that for anything else the plaintiff shall be left to what may be recovered upon an arbitration under the Act. For this purpose, however, it would be necessary that the defendants should now be permitted to put in evidence of their maps, plans, etc., relating to the deviation, and this, I think, is an indulgence which should not be granted. It could serve no purpose but a new assessment of the damages which have already been assessed by the jury as for a permanent diversion of the stream. It would be most unreasonable to prolong the litigation between the parties for this purpose. It was strongly urged that the defendants could by a very slight expenditure turn the stream as it was before, and therefore that they should not be fixed with damages as for a

permanent obstruction. Had the damages awarded been extremely large it might be proper to accede to this view upon terms, but where no more than \$350 have been given by the jury the injustice to the defendants of allowing the verdict to stand is not apparent, especially as they would seem to have brought the litigation upon themselves by disregarding all the plaintiff's complaints and requests for a settlement.

Judgment.

OSLER,
J. A.

In cases of this kind where the plaintiff is clearly entitled to relief in one forum or the other, and where the defendants have not pointedly and conclusively shewn him to be wrong in the forum of his selection, the cases of *Parkdale v. West*, 12 App. Cas. 602, and *North Shore R. W. Co. v. Pion*, 14 App. Cas. 612, are authority for holding that the whole damage may be assessed once for all, and that the plaintiff will not be confined merely to damages down to the trial leaving future damages as for a continuing injury to be recovered in a subsequent proceeding. In the case of *West v. Parkdale* (No. 2), in this Court (13th November, 1888) not reported, the question was considered and the authorities referred to.

The *Pion* case, though an appeal from the Province of Quebec, was concerned with an Act containing provisions substantially similar to those to which the present defendants are subject, and dealt with the questions of liability and damage on principles entirely applicable here. The action was against a railway company for cutting off by means of an embankment the plaintiffs' access from their manufactory to the river St. Charles. It was held that as the defendants had not taken the proceedings necessary under their Act, to vest in them the power to exercise the right or do the thing for which compensation would have been due under the Act, an action would lie for damages and for removal of the obstruction, in which, if the obstruction were not ordered to be removed, damages as for a permanent injury to the land might be recovered. By this is meant not merely such damages as a reversioner would have been entitled

Judgment.

OSLER,
J.A.

to recover at law under the old practice for a permanent injury to the reversion, which were only assessed up to the time of the commencement of the action and which might be, and usually were, in the first action at all events, nominal merely, but damages once for all in the nature of the compensation which might have been awarded had the proceedings been taken under the Act by arbitration. This, too, is in accordance with the provisions of the Judicature Act, sec. 53 (9), which enables the Court to give damages in addition to or in substitution for an injunction : *Holland v. Worley*, 26 Ch. D. 578 ; *Sayers v. Collyer*, 28 Ch. D. 103. And for an instance in which complete and final relief was given in an action by a reversioner, by awarding damages in lieu of an injunction, the case of *Mayfair Property Company v. Johnston*, [1894] 1 Ch. 508, may be noticed.* See also as to the measure of damages where they are not awarded in lieu of an injunction : *Battishill v. Reed*, 18 C. B. 696 ; *Bell v. Midland R. W. Co.*, 10 C. B. N. S. 287.

The appeal will, therefore, be dismissed, the plaintiff filing either here or with the registrar of the Court below a release or other acquittance from the mortgagee of the premises.

MACLENNAN, J. A. :—

The first question in this appeal is, whether there was evidence for the jury of a legal watercourse, and I am of opinion that there was, and that the charge of the learned Judge on that point was unobjectionable. I do not find any fault with anything that is said by the learned Chancellor in *Beer v. Stroud*, 19 O. R. 10, and I think that it is all warranted by the authorities which he cites. A watercourse must always have some point of commencement, and it may not be quite easy in every case to say just precisely where that point is. If a stream is traced up towards its source a

* See *Shelfer v. City of London Electric Lighting Company*, [1895] 1 Ch. 287.—REF.

point will always be reached where it ceases to be definable by a bed and banks ; but until that point is reached it must be a watercourse, whether its origin be a spring, or several springs, or the rain or snowfall of a district collected naturally, and flowing away for the first time in a visible course or channel. All our lakes, rivers, and streams have their source in the clouds of the sky precipitated in the form of rain or snow, and the sole question in every case is, whether the water thus precipitated has formed for itself a visible course or channel, and is of sufficient magnitude or volume to be serviceable to the persons through or along whose lands it flows. It is immaterial that it may be intermittent in its flow, or that at certain seasons of the year there may be little or even no flow of water. In this country, where we have no mountain streams supplied by melting snow, and where we have long periods with but little rainfall, streams of considerable magnitude become nearly dry in summer, and yet no one would hesitate to call them watercourses. Most of the later decided cases are referred to by the learned Chancellor in *Beer v. Stroud*, 19 O. R. 10, and need not be mentioned here again, but I cite the following passage from the judgment of Alderson, B., in *Broadbent v. Ramsbotham*, 11 Exch. at p. 615, cited with approval by Chelmsford, L. C., in *Chasemore v. Richards*, 7 H. L. C. at p. 376: "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook ; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel." That passage, I think, marks the distinction which required to be attended to in this case, and I think that having regard to the evidence and the way in which the law was presented to the jury, the verdict in that respect ought not to be interfered with.

Judgment.

MACLENNAN,
J.A.

Judgment.

MACLENNAN,
J. A.

The next question is whether the plaintiff can obtain redress by action or whether he must resort to arbitration. Upon this point I am unable to distinguish this case from *North Shore R. W. Co. v. Pion*, 14 App. Cas. 612. The provisions of the Railway Act of Quebec which were applicable in that case are identical with those of the Railway Act of Canada by which the defendants are governed, and that case shews that the mere filing of plans, etc., is not sufficient to deprive a landholder, whose land is injuriously affected, of his remedy by action. That being so, it would not help the defendants if we granted the indulgence asked for on the argument of supplying an omission at the trial by proving the filing of the company's plans and book of reference. The injury to the plaintiff by cutting off and diverting the watercourse was obvious, and not one that could not be foreseen, and therefore it cannot be regarded as outside the requirements of the statute with reference to compensation.

The remaining question is as to the assessment of the damages. It was contended that being in their nature continuing damages they could not be assessed as for a permanent injury, and that the judgment should be only for the \$12 assessed for the period of one year next before action brought and not for \$350 as for permanent injury.

I think that question must also be decided in the plaintiff's favour. The plaintiff being entitled to damages for a continuing injury, was also entitled to an injunction to restrain its continuance. By sec. 53, sub-sec. 9 of the Judicature Act, however, damages may be awarded in lieu of an injunction in such a case. If the defendants had offered or undertaken to restore the watercourse to its original condition of usefulness, no doubt the Court would have restricted the damages to such time as that might be done. But the defendants not having offered to do so, the assessment of damages as for a permanent injury was entirely proper. The same thing was done in *Parkdale v. West*, 12 App. Cas. 602, a case very like the present; and also in the

case already referred of *North Shore R. W. Co. v. Pion*, 14 Judgment.
App. Cas. 612.

MACLENNAN,
J.A.

I therefore think that the appeal should be dismissed.

BURTON, J. A. :—

I agree.

Appeal dismissed with costs.

BEATON V. THE INTELLIGENCER PRINTING AND PUBLISHING COMPANY.

*Defamation — Libel — Pleading — Evidence — Damages — Practice — Consol.
Rules 399 and 573.*

Facts intended to be relied on in mitigation of damages in a libel action must be set out in the statement of defence, and unless this is done they can not be given in evidence.

Consolidated Rule 399 is inconsistent with Consol. Rule 573, and governs. The defendant may plead in mitigation of damages that the article complained of was published in good faith in the usual course of business. Judgment of ROBERTSON, J., reversed.

THIS was an appeal by the defendants, proprietors and publishers of a newspaper, from the judgment of ROBERTSON, J., allowing a demurrer by the plaintiff in an action of libel to the following paragraphs of the statement of defence :—

"5. The defendants say that the said words complained of, if published by them (which they do not admit), were received in the usual course of business, in stereotype form, from the Central Press Agency a very short time before going to press on the 5th day of August, 1893, and the said matter was inserted in the said newspaper, if it was inserted, in the ordinary course of their business and without any knowledge of its contents.

* * * * *

"7. The defendants say that the article complained of, had for some days prior to the day which the plaintiff

Statement. alleges the defendants published it, appeared in the New York and Toronto daily newspapers, and that the same had, before the alleged publication by the defendants, become a matter of public national and international interest, and that the said article is a fair and *bond fide* report of what was then public news, and if it was published by the defendants, which they do not admit, it was so printed and published *bond fide* and without malice, and for the benefit of the public and not otherwise.

"8. The defendants say the said article is a benefit to the plaintiff, as it gives her denial to what she alleged were slanderous stories which had been circulated about her in the village where she lived."

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th of November, 1894.

W. R. Riddell, for the appellants. A demurrer should not be allowed if any relief can be fairly based upon the pleadings demurred to: *Watson v. Hawkins*, 24 W. R. 884; *Oliver v. McLaughlin*, 24 O. R. 41. It is not contended that the paragraphs demurred to set out facts that constitute a bar to the action. It is conceded that these facts are not a defence except as to damages, but they could be given in evidence in mitigation of damages and therefore are properly and necessarily set out in the defence. It is not necessary that the facts should be set forth explicitly as in mitigation of damages: *Livingston v. Trout*, 9 O. R. 488, at p. 493. The test seems to be whether the facts set out are notice of evidence which would be receivable in mitigation of damages. If so, they are properly there under Consol. Rule 399, and unless there the evidence could not be given at the trial: *Moore v. Mitchell*, 11 O. R. 21; *Pursley v. Bennett*, 11 P. R. 64; *Millington v. Loring*, 6 Q. B. D. 190, at p. 194; *Scott v. Sampson*, 8 Q. B. D. 491, at p. 503; *Whitney v. Moignard*, 24 Q. B. D. 630; *Lumb v. Beaumont*, 49 L. T. N. S. 772. The rule in England referred

Argument.

to in *Wood v. Earl of Durham*, 21 Q. B. D. 501, which provides that no denial or defence shall be necessary as to damages claimed or their amount but they shall be deemed to be in issue in all cases unless expressly admitted, was first introduced by the Rules of the Supreme Court, 1883, and was not in force in England when *Millington v. Loring*, 6 Q. B. D. 190, and *Scott v. Sampson*, 8 Q. B. D. 491, were decided. This rule has not been adopted in Ontario, and those cases still govern, and all facts that the party pleading would be allowed to prove at the trial can and should be pleaded. Paragraph 5 sets out the circumstances under which the alleged publication took place to rebut the charge of malice, and to shew the absence of malicious motive or intention; and this is always allowed in mitigation of damages: *Odgers on Libel*, 2nd ed., p. 317, citing *Pearson v. Lemaitre*, 5 M. & G. 700; *Folkard's Law of Slander*, p. 542. And see *Consol. Rule 573*. Paragraph 7 sets out facts that may also be proved in mitigation of damages in the same way. Prior publication in other papers may in itself be a circumstance mitigating damages: *Wyatt v. Gore*, Holt N. P. C. 299; *Davis v. Cutbush*, 1 F. & F. 487; *Hunt v. Algar*, 16 C. & P. 245. But even if not still the fact that such publication had taken place in other newspapers and had become public news, could not be taken from the jury in considering the motive and intention of a newspaper publisher in printing and publishing the news in his newspaper. At the least the pleading that the publication was made *bond fide* and without malice should not be struck out. An honest intention to publish a fair account of what had actually taken place may be given in evidence in mitigation of damages: *Smith v. Scott*, 2 C. & K. 580. The paragraphs demurred to at the worst are merely an inartistic way of pleading that the plaintiff has suffered no damage. And if in form the paragraphs are wrong, the defendants should have been allowed to amend upon proper terms.

G. Lynch-Staunton, for the respondent. The facts set out in paragraph 5 shew that the defendants published

Argument. the matter complained of recklessly and without taking the slightest trouble before publication to ascertain whether the charges were true, and disclose no defence, nor are they pleadable in mitigation of damages. The seventh paragraph discloses no ground of defence, and the facts therein alleged cannot be given in mitigation of damages under the circumstances therein alleged: *Odgers on Libel*, 2nd ed., p. 313; *Brown v. Moyer*, 20 A. R. 509. The defendants cannot shew they repeated the story, they must shew it is true: *McPherson v. Daniels*, 10 B. & C. 263; *Muma v. Harmer*, 17 U. C. R. 293, and the fact that other newspapers have defamed the plaintiff does not make the libel a matter of public interest: *Odgers*, 2nd ed., p. 31. The facts have been pleaded in bar of the action, not in mitigation of damages, and it is too late now to support the pleas on the latter ground. The facts set out could not be given in evidence: *Manitoba Free Press Co. v. Martin*, 21 S. C. R. 518; certainly not without an admission of publication: *Switzer v. Laidman*, 18 O. R. 420.

W. R. Riddell, in reply.

January 15th, 1895. BURTON, J. A.:—

I must confess that when I first read the defendants' pleading I was under the impression that the learned Judge was right in allowing the demurrer, and my old-fashioned notions of special pleading received a shock at the want of precision shewn in this modern specimen of the art, leaving it somewhat uncertain whether the plea was intended as in justification or in bar of the action, or in mitigation only. But we must endeavour to keep pace with the innovations of the age, one of which is that a defendant may plead to damages, another that if he fails to do so he is debarred from giving evidence in mitigation, and we are awakened to the further fact that pleadings *quâ* pleadings are in effect abolished, and that what we are dealing with is a statement of facts relied upon either as an absolute defence to the action or in mitigation of the damages which the plaintiff may be entitled to recover.

The demurrer treats the pleas as if pleaded in bar of the action, and the learned Judge has decided upon that ground. The more artistic mode of pleading after raising those defences which went to bar the action, would have been to say: But if the defendants should be held to be guilty of what is charged in the statement of claim they say (setting forth the matter alleged in mitigation).

In reference then to paragraph 5: Would evidence be receivable that the defendants had received the article from a usual source under circumstances which prevented them from giving close attention before printing it?

I think such evidence would be receivable, and if so, it must be pleaded to enable it to be put in evidence.

Paragraph 7 seems to me to state facts, leaving out the hifalutin portion of it, as to its being "a matter of public national and international interest," which could also be given in evidence to rebut malice.

I have had more doubt as to paragraph 8; but what I understand that to mean is this: I not only published this article, but I published your denial. I think it a very unnecessary pleading, and what is alleged is what would be used as an argument to the jury in mitigation on production of the article itself. It is a very harmless statement, and not tending to embarrass, and would not, therefore, be struck out on motion, neither should it, in my judgment, be held a good ground of demurrer.

I think, therefore, that the appeal should be allowed.

OSLER, J. A. :—

I think it might well be held by this Court, without unduly straining Rule 573, that it was intended thereby to dispense with the necessity in actions of libel and slander of setting forth in the statement of defence facts which the defendants rely upon in mitigation of damages. If, notwithstanding the Rule, it is nevertheless necessary to set forth these facts in the defence, the Rule serves no purpose whatever, as the particulars which it requires the defendant to furnish are the very facts which he has

Judgment.

BURTON,
J.A.

Judgment.

OSLER,
J.A.

already set forth in the defence, and of which, therefore, the plaintiff has had the full notice which it was the object of Rule 573 to afford him. The Rule was taken from the English Rule 461 of 1883, which was no doubt passed to supplement Rule 237 (Order XXI, Rule 4): "No denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted." When our Consolidated Rule 573 was adopted from the English Rule, its framer seems to have overlooked the latter Rule and to have left Rule 128, O. J. A., untouched, re-enacting it as Consolidated Rule 399: "Pleadings shall contain a concise statement of the material facts upon which the party pleading relies," under which it had been held, following *Scott v. Sampson*, 8 Q. B. D. 491, that, in actions of libel and slander such matters as are mentioned in Rule 573, intended to be relied on in mitigation of damages, ought to be set forth in the defence. As I have said, to hold that this cannot still be done, deprives Rule 573 of any reason for its existence. But as I understand that some of my learned brothers are of opinion that Rule 399 is still in force as regards such actions as the present, and that the practice laid down in *Scott v. Sampson*, 8 Q. B. D. 491, ought to be followed, I am unwilling to differ from them to the extent of holding that material facts in mitigation of damages must not still be pleaded in accordance with the unfortunate system which now prevails of throwing everything on the record.

I cannot find authority for holding that facts so set out in the statement of defence must be pleaded expressly to damages, reasonable and convenient as such a mode of pleading them would be, and therefore I feel compelled to say that paragraphs 5, 7 and 8 of the defence were not the subject of demurrer. If embarrassing or impertinent, the plaintiff should have moved to strike them out.

There is not much to complain of in paragraph 5, as it seems meaningless, unless treated as pleaded to damages for whatever it may be worth. But paragraphs 7 and 8 are distinctly objectionable; the seventh as leaving it doubtful whether the defendants will not insist upon it and raise an

issue on it as a defence of privilege, or whether they will merely put it forward then as in mitigation of damages. The eighth paragraph is simply impertinent. It states no fact except what appears in the previous pleading, and which, therefore, under Rule 402, should not have been set up again, viz. : that the libel contains the plaintiff's denial of its truth, and the argument, if such trifling is worthy of being called an argument, that this is a benefit to the plaintiff. There is nothing in *Millington v. Loring*, 6 Q. B. D. 190 ; *Lumb v. Beaumont*, 49 L. T. N. S. 772 ; *Smith v. British Marine Mutual Ins. Association*, 28 Sol. J. 166, which justifies such a method of pleading or which shews that the Court could not, if the plaintiff thought the matter worth powder and shot, compel the defendant to correct it. As, however, it is not demurrable the appeal must be allowed. But a defendant who pleads in this manner and who, as regards one paragraph at all events, has pleaded what, in the technical sense of the words, is mere scandal and impertinence, is not entitled to favourable consideration in the matter of costs, and I am therefore for giving no costs of the appeal.

Judgment.
OSLER,
J.A.

MACLENNAN, J. A. :—

I think that this appeal should be allowed. I do not think the case referred to by the learned Judge of *Macdougall v. Knight*, 14 App. Cas. 194, has any application, for the reason that there was not then, and could not be, any question of demurrer, inasmuch as before that action was commenced demurrers had been abolished in England.

The question arises upon the construction of our Consol. Rules 384 and 399, the first of which authorizes a demurrer to any pleading, or any part of a pleading setting up a distinct ground of defence, on the ground that the facts alleged therein do not shew any ground of defence to a claim or part thereof to which the Court can give effect against the party demurring, and the other directs that pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved.

Judgment. Under the English Rule corresponding with Rule 399, it was held that circumstances tending to aggravate or to mitigate damages must be pleaded as being facts on which the party relies : *Millington v. Loring*, 6 Q. B. D. 190, at pp. 194, 195 ; *Scott v. Sampson*, 8 Q. B. D. 491, at pp. 503, 507. In England, the rule as to pleading facts which go to the quantum of damages has been altered, so far as defendants are concerned, by O. 21, R. 4 (1883), but no such change has been made in our rules. It follows, therefore, that if the matters here demurred to are proper to be proved in mitigation of damages, it must be allowable and necessary to state them in the defence, for otherwise the defendant would not be allowed to prove them by evidence.

Then is there any reason why the defendant should not be allowed at the trial to prove everything contained in these paragraphs of his defence ? With reference to paragraph 5, I see no reason. Everything there stated would, in my judgment, be admissible in evidence as shewing that at all events the libel did not originate with the defendants, and so tending to shew that it was not published with any actual malice against the plaintiff. So, too, with regard to paragraph 7. Parts of it, indeed, may be open to some criticism as matter in mitigation, but upon the whole, and it is, as a whole, it is demurred to. I think it as free from objection as paragraph 5. The same observation applies to paragraph 8. In strictness it is no defence, but only an argument or submission ; but yet it is a legitimate argument as to damages. It says in effect : Even upon the plaintiff's own shewing, she has not been injured, but benefited, inasmuch as her denial of the injurious stories is given in the article complained of.

Upon the whole I think the demurrer ought not to have been allowed, and that the appeal should succeed, but without costs.

HAGARTY, C. J. O. :—

I agree in allowing the appeal.

Appeal allowed without costs.

THOMSON V. EEDE.

County Court—Jurisdiction—Liquidated Amount—Guaranty—Amendment—Statute of Frauds.

The County Court has no jurisdiction to entertain an action for more than \$200 on a guaranty, in general terms, of payment of the price of goods, there being no liquidation or ascertainment of the amount as between the vendor and the guarantor, a liquidation or ascertainment by the debtor not binding the guarantor.

Where an action was for two unliquidated claims each within but together beyond the jurisdiction of the County Court, the plaintiff was allowed after judgment to amend by abandoning one of them.

As a written memorandum of an oral guaranty is required only for the purpose of evidence a letter or other writing subsequently given by the guarantor sufficiently shewing the terms of his undertaking will suffice.

A letter shewing the terms written by the guarantor partly on his own behalf and partly on behalf of a firm of debtors and signed by him in the firm name and in his own name for them *per proc.*, is sufficient to bind him.

Judgment of the County Court of Essex varied.

THIS was an appeal by the plaintiffs from the judgment Statement of the County Court of Essex.

The action was brought against the defendant as guarantor to recover \$378.36, the price of lumber supplied by the plaintiffs to a firm of Dougherty & Eede.

A car-load of lumber was sold and delivered to the firm on the 11th of July, 1892, at an agreed on rate per thousand feet, the price being \$193.92. In August, 1892, the defendant, who was acting as clerk or agent of the firm, ordered a further small quantity of lumber, which was delivered and paid for. Subsequently the defendant ordered another car-load of lumber, which was delivered on the 27th of September, 1892, the price being \$184.44. The guaranty was given shortly before the second order, and included, according to the plaintiffs' evidence, all three orders, and the action was brought to recover the amount of the first and third.

The defendant took the objection that the action was not within the jurisdiction of the Court, and also set up the Statute of Frauds.

The action was tried on the 13th of June, 1894, before His Honour Judge Horne and a jury, who found a verdict

Statement. in the plaintiffs' favour, judgment being reserved upon the question of jurisdiction.

Subsequently this objection was given effect to, and the action was dismissed with costs.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, J.J.A., on the 26th of November, 1894.

W. R. Riddell, and *H. E. Rose*, for the appellants.

A. H. Clarke, for the respondent.

January 15th, 1895. HAGARTY, C. J. O.:—

I am of opinion that the learned County Judge was right in dismissing the action as beyond the jurisdiction of the County Court. I think it impossible to hold that either of the amounts claimed, viz., \$193.92 or \$184.44, was ever liquidated or ascertained between the parties or by the signature of defendant within the meaning of our statute.

I see nothing in the argument of the plaintiffs that the position of the defendant as keeping the books of the firm or receiving the invoices for each shipment can affect the case. *Ostrom v. Benjamin* (No. 2), 21 A. R. 467, in this Court, expresses our views.

No part of either of the claims was, as we hold, liquidated, and that takes the case out of the authority of such cases as *Vogt v. Boyle*, 8 P. R. 249, or *McLaughlin v. Schaefer*, 13 A. R. 253, where the liquidating of a part of the whole claim is discussed.

No portion of the claim here was liquidated or ascertained by signature.

OSLER, J. A.:—

For the purpose of the objection to the jurisdiction, it may be assumed that the guaranty was in writing as required by the Statute of Frauds. The price per thousand was

agreed on in respect of each order, and invoices, shewing the total quantity and price of such delivery respectively, were sent to the firm, and probably seen by the defendant. But the evidence goes no further, and this is not sufficient to shew an ascertainment or liquidation by the act of the parties. The action is against a guarantor, and to entitle the plaintiffs to recover they must prove, not only the guaranty, but how much remains due and payable on the debt guaranteed. As between the original parties the debt may have been liquidated or ascertained in either of the ways pointed out by the Act, and the debtor may have even given his note for it, but when the guarantor is sued, and the question of jurisdiction arises, the parties between whom the adjustment or liquidation must be shewn to have taken place, or the party whose signature is to have that effect, are the creditor and the guarantor, or the guarantor himself, because the admission or act of the debtor cannot bind the guarantor as to the amount which he is liable to pay to the creditor: *Ex parte Young*, 17 Ch. D. 668.

Judgment.

OSLER,
J.A.

There being here no evidence that the amount was liquidated or ascertained by or between the proper parties as required by the Act, the learned Judge was right in holding that he had no jurisdiction to try the action as launched. No amendment was asked, and the case was tried out and left to the jury, subject to this objection, and to the further objection that there was no note or memorandum in writing of the alleged guaranty as required by the 4th section of the Statute of Frauds. The jury found in favour of the plaintiffs on all the other defences raised, and in view of the course I propose to suggest, I think I should consider the second objection. There is no doubt that the guaranty when given was verbal, and had there been no other evidence of it than this, the plaintiffs could not have recovered in any court. But a writing being necessary merely for the purpose of evidence, and to protect people from having parol agreements imposed upon them, a letter or other writing subsequently given by the defendant sufficiently shew-

Judgment.

ONLAW,
J.A.

ing the terms of his undertaking will suffice: *Shippey v. Derrison*, 5 Esp. 190; *Tuwney v. Crouther*, 3 Bro. C. C. 161; *Bradford v. Roulston*, 8 Ir. C. L. 468 (1858); *Munday v. Asprey*, 13 Ch. D. 855.

Referring briefly to the circumstances under which the guaranty was given, it appears that Dougherty, the senior partner of the firm, left Leamington, where their business was carried on, a day or two after the order of July, 1892, was given. The partnership, however, was not dissolved, and the defendant came in to assist his brother to carry out the existing contracts of the firm, and to take charge of the books, and he gave the guaranty in question in order to induce the plaintiffs to continue to supply the further material required. After the order of September had been filled there was some correspondence between the plaintiffs and the firm as to a further supply, conducted on the side of the latter by the defendant who, on the 18th of October, wrote them as follows: "In response to your favour of the 15th inst., permit me to say—True, the business is in a position where it cannot pay you what it owes you, but neither I nor my brother have had anything to do with placing it in that position. Out of respect for my brother I agreed to become responsible to you for all orders sent in by us, but I expect to be treated as an honest man and not made to suffer for other men's folly and mismanagement. We need that lumber urgently at present and hope you will ship without further delay. Mr. Eede will go to Amherstburg and London to-morrow to complete arrangements entered into with you. Yours respectfully, Dougherty & Eede, *per proc.* E. T. Eede."

A fact bearing upon the construction of the guaranty and as to what was intended to be covered by it, is that when the defendant gave it, the firm of Dougherty & Eede were indebted not merely in respect of the lumber sent on the July order (given by the defendant's brother) but also in a very large amount for lumber supplied to them previously to Dougherty's departure.

It appears to me that in the letter of the 18th of October

there is a clear acknowledgment under the hand of the defendant of a guaranty given by him to the plaintiffs. It is true that he signs the firm name as well as his own, and that in some respects he is speaking for the firm.

Judgment.
OSLER,
J.A.

But it is also evident that in others he is speaking for himself and is referring to himself and his brother. He is the "I" of the letter. "Neither I nor my brother": "Out of respect for my brother I agreed, etc.": and the expression "sent in by us," means "by my brother or myself." The document is unintelligible unless thus construed, and the evidence supports that construction. It is immaterial that defendant has signed *per proc.* the firm, for it may be shewn, and as I have said, it does here appear, that he intended to sign in both capacities, in his own right and also as agent for the firm. It is, in short, a double signature. On this point it is only necessary to refer to *Young v. Schuler*, 11 Q. B. D. 651. Thus construed the guaranty includes the lumber ordered by the defendant's brother in July and that ordered by himself for the firm, and received in September.

It may be that the plaintiffs instead of losing and paying the costs of this action, and bringing a new action for their whole claim in the High Court, will think it less onerous to take a judgment in the County Court for the amount of one of the orders which would be for a claim within the jurisdiction. I think they should have the option of doing so, and of making the necessary amendment in or abandonment of part of their claim: see *In re Walsh v. Ionides*, 1 E. & B. 383; *In re Kirkin v. Kirkin*, 3 E. & B. 399; *Fitzsimmons v. McIntyre*, 5 P. R. 119; *Greenizen v. Burns*, 13 A. R. 481; *Davidson v. Belleville and North Hastings R. W. Co.*, 5 A. R. 315.

If they choose to do so, the verdict should be reduced to the amount of the larger order, and judgment entered therefor with interest and costs of suit, the plaintiffs paying the costs of the appeal as a condition of the relief thus granted to them.

Judgment.

OSLER,
J.A.

But if they think it better to proceed for the whole, and in another Court, we can only dismiss the appeal.

BURTON, and MACLENNAN, JJ.A., concurred.

Appeal allowed on terms.

IN RE TOWNSHIP OF MERSEA AND TOWNSHIP OF
ROCHESTER.

IN RE TOWNSHIP OF GOSFIELD NORTH AND TOWNSHIP
OF ROCHESTER.

Drainage—Municipal Corporations—Drainage Trials Act—55 Vict. ch. 42, secs. 583, 584, 598 (O.)—54 Vict. ch. 51, secs. 2, 3 (O.)—Jurisdiction of Referee.

Where drainage works affecting several minor municipalities are constructed by the county, each minor municipality must keep in repair the part of the works within its own limits, and cannot call upon the other minor municipalities to contribute to the expense of repairs.

Per HAGARTY, C.J.O., and MACLENNAN, J.A. The drainage referee has jurisdiction to set aside a by-law of a minor municipality charging other minor municipalities with a portion of the expense of such repairs.

Per BURTON and OSLER, JJ.A. The drainage referee has no jurisdiction. His jurisdiction depends upon that of the township. If they have exercised it wrongly or mistakenly he may review their action, but he cannot set aside a by-law which they had no power under any circumstances to pass.

In the result the referee's judgment, holding that he had jurisdiction and setting aside the by-law, was affirmed.

Statement.

THIS was an appeal by the township of Rochester from the judgment of the Drainage Referee, setting aside, under the circumstances mentioned in the judgments, a by-law passed by the appellant township for repairing a county drain and charging portions of the cost on the other two townships, and it was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 27th of September, 1894.

M. Wilson, Q. C., and J. B. Rankin, for the appellants.

A. H. Clarke, for the township of Gosfield North.

M. Cowan, for the township of Mersea.

January 15th, 1895. HAGARTY, C. J. O. :—

Judgment.

HAGARTY,
C.J.O.

The county of Essex in 1883 passed a by-law for the deepening of the river Ruscom as a drainage work affecting several municipalities, Rochester, Gosfield, Mersea and Tilbury West. This was on the report of their engineer, Mr. Laird, the cost being about \$38,000. He distributed the proportion of cost as to each township for lands and roads.

The county council, in the usual manner, raised the money and executed the work, assessing under the statute the amounts required from the different townships for the payment of interest and sinking fund, etc.

Their surveyor, in his report, directs: "This drain shall be kept in repair by a tax on the lands and roads mentioned in the schedule, assessments in the same relative proportions as for the construction, under the provisions of section 585, Consolidated Municipal Act, 1883. The estimated cost of constructing the drain, building bridges, etc., with incidental expenses, is \$38,977, distributed on the several municipalities interested in the drain, as follows:

" On lands in Rochester as benefited ..	\$7,290 00
" On roads	3,412 00
" Lands, Gosfield	9,312 00
" Roads, Gosfield	5,566 00
" Lands, Mersea.....	8,931 00
" Roads, Mersea.....	4,016 00
" Lands, Tilbury West.....	353 00
" Roads, Tilbury West.....	97 00

"Accompanying you will find plans and specifications, estimates, assessments, all the papers requisite for your guidance in the construction of the river Ruscom drain."

The drain in question fell out of repair, and the Rochester corporation passed a by-law in September, 1893, reciting the necessity for repair in their township, and reciting also the above scale of assessment in Laird's report to the county council and his direction as to how it

Judgment.

**HAGARTY,
C.J.O.**

was to be kept in repair, and that a report had been made to them by their surveyor Tiernan, that \$9,744.25 were required for such repairs in Rochester. The by-law then provided for raising \$2,675, which, with \$3,719 to be contributed by Gosfield, and \$3,236 by Mersea, and \$112.50 by Tilbury, were the funds necessary.

It then directed that each of the municipalities be notified of this by-law; that Gosfield is hereby charged with and required to contribute and pay to Rochester the sum of \$3,719, their proportion; the same as to Mersea and Tilbury West. They then gave a schedule of the lands in Rochester to be assessed pursuant to the report of Laird set forth in the county by-law.

Tiernan's report merely states the amount and nature of repairs, and makes no assessment on any lands either in Rochester or elsewhere.

The usual notices were given to the other townships by the township of Rochester, and they appealed to the drainage referee from the report and by-law of Rochester, and the estimates, plans and profiles accompanying same, on the ground, in substance, that there was no authority in law for assessing or calling for contribution, with many other objections.

The learned referee has stated the whole case in a very careful and lucid manner. He held on objection to his jurisdiction in favour of its existence, and second, against the validity of the attempt of Rochester to charge the other townships. As to jurisdiction, I have come to the conclusion in favour of the referee's view.

By the Act of 1891, 54 Vict. ch. 51 (O.), the referee was appointed. He is to have all the powers of an official referee and of arbitrators under the Municipal Acts, etc., to have power to grant an injunction or a mandamus, and by section 3, as amended by 55 Vict. ch. 57 (O.): "In all matters before the referee, he shall, subject to appeal, have all the powers heretofore possessed by the High Court, and by arbitrators respectively, as to determining the legality of all petitions, * * and of all resolutions

reports and provisional and other by-laws, whether the objections thereto are stated as grounds of appeal or not."

Judgment.

HASSETT,
C.J.O.

The Consolidated Municipal Act of 1892 [55 Vict. ch. 42 (O.)] recognizes the referee in many sections as an officer for the settlement of matters in dispute.

I read many of these drainage sections as indications of the general design of the Legislature to extend the referee's powers as far as legitimately may be done for the general arrangement of disputes between municipalities.

I refer to such sections as 581 and 583; the last section, referring to works done under this or any former Act, directs that each municipality in the proportion determined by the engineer, surveyor, or referee (as the case may be), or until otherwise determined by the engineer, surveyor or referee, is to preserve, maintain and keep in repair the same within its own limits, either at the expense of the municipality, or parties more immediately interested, or at the joint expense, etc., as to the council upon the report of the surveyor or engineer may seem just. And any municipality neglecting or refusing upon notice, etc., may be compellable by mandamus issued by the referee or any competent court, etc., to do the repairs, and the municipality so called on may apply to the referee to set aside the notices, etc. I refer to such sections as indicative of an apparent intention to extend and enlarge the class of cases in which the referee may interfere. See also sections 590, 591. Then there is a general clause, section 568a: That in sections from 569 to 612, the word "referee" shall mean the drainage referee, "and the word 'reference' in the said sections shall mean a reference to the said referee, and the provisions of the said Act (*i. e.*, Drainage Trials Act), shall apply to all proceedings instituted under the drainage clauses of this Act, according to the true intent and meaning thereof."

The clause already cited, as amended, in the Drainage Trials Act, comprehends appeals to the referee to determine the legality of all resolutions, reports, and provisional or other by-laws.

Judgment. I am of opinion that this matter was properly within his jurisdiction.
Hickman,
C.J.O.

Then as to his conclusions: It may be quite true that Mersea or Gosfield was not bound to take any action when required to provide moneys, and could have answered an application for mandamus on the grounds taken before the referee. But that is no reason why they should not take the course adopted here of applying at once to the referee to hear and decide on their objections to the Rochester proceedings.

I must refer to the report for the very full statement of the whole case and the arguments on either side. Rochester insists that the county by-law of 1883 fixed for all time the proportion to be contributed by each township for repairs based on Mr. Laird's apportionment. On the other side it is urged that the county engineer had no authority to make any such provision as to maintenance and repairs; that all the county council could do was to execute the work and charge on each municipality and its specified lands the proportion of its liability for the repayment to the county of the debt incurred therefor, and that the statute, section 599, provided for the liability of each municipality. Section 584 directs that where the works are done under section 598 (under which the county does the work), it shall be the duty of each minor municipality to preserve, maintain and keep in repair the same within its own limits in accordance with the requirements of the preceding section 583. As the learned referee remarks, this section 583 may not be easy to understand, but whatever view may be taken of it, it cannot support the appellants' contention. The Rochester engineer affects to assess or charge no specified lands.

I agree with the learned referee, that the county engineer had no authority to prescribe (apparently for all time to come) the liability of named lands in the several townships.

I think this direction was beyond the powers conferred on the county council by the Legislature. It would be

most inconvenient and unwise to infer the existence of such a power when not expressly given. The circumstances of the whole drainage system and maintenance may be changed in the course of a number of years, and it may be well supposed that when the county had, on request, assumed the duty of executing the work, that its future might be safely left to the several municipalities interested. At all events, Rochester had no right in any view of the case on such a report as Mr. Tiernan's, to make any demand or requisition on either Mersea or Gosfield, and the latter, in my judgment, had the right to bring the by-law, report and demand before the referee for his decision, and were not bound to wait until a mandamus might be issued from the High Court.

Judgment.

HAGARTY,
C.J.O.;

I think that the appeal must be dismissed and the referee's judgment be upheld.

BURTON, J. A. :—

Whilst strongly inclined to the view that the referee was right upon the merits, I give no judgment upon that point, as I have come to the conclusion, after considerable fluctuation of opinion, that he had no jurisdiction.

It appears perfectly clear to me, that arbitrators would have had no power to deal with this question, nor would the High Court. If the township itself had no power to deal with such a question, the by-law which is impeached was a mere *brutum fulmen* and hurt nobody.

If I am right in supposing that neither the arbitrators nor the High Court could have interfered, it was not properly before the referee on appeal.

I agree with my brother Osler, and cannot usefully add anything to his very able judgment.

The appeal, therefore, should, in my opinion, be allowed, for want of jurisdiction in the referee.

OSLER, J. A. :—

The three townships in question are in the county of Essex.

Judgment.

OSLER,
J.A.

On the 9th of October, 1883, the county, under the provisions of section 598 of the Consolidated Municipal Act of 1883, and relative sections, passed a by-law for the deepening of the river Ruscom in that county, a work which affected all three municipalities, and also the municipality of Tilbury West. The cost of the work, as set forth in the report of the county engineer, was \$38,977, which was distributed between and upon the several municipalities as therein specified. The report also stated that the work should be kept in repair by a tax on the lands and roads mentioned in the schedule in the same relative proportions as for the construction under the provisions of section 585 of the Consolidated Municipal Act, 1883. The by-law enacted that the report, plans and estimates of the engineer be adopted, and that the several townships should, and they were thereby required to, pass by-laws in their respective municipalities for collecting the amounts assessed for construction against lands or roads therein and pay the same over to the county treasurer with the county rates.

The work was duly constructed and paid for, and the townships of Mersea and Gosfield kept the same in repair thereafter within the limits of their jurisdiction.

On the 21st of September, 1893, the township of Rochester passed a by-law reciting the county by-law of 1883, and that part of the drain within the said township had fallen into disrepair, and that they had procured a surveyor to examine it and to prepare plans, profiles and estimates of the work necessary to put it into repair, and that he had reported that it was necessary to raise the sum of \$9,744.25 for that purpose. It was then enacted that \$2,675, being the share or proportion of that sum to be contributed by Rochester, should be raised in the manner provided. That the other townships already mentioned being corporations interested in and liable to contribute to the work, be notified of the by-law and of the proceedings to be taken thereunder. That Gosfield be charged with \$3,719, as the proper proportion to be borne by it in the making of

the proposed repairs, and that the township of Rochester do forthwith request the corporation of Gosfield to raise and pay the same. There were similar clauses as to the townships of Mersea and Tilbury West, the former being charged with \$3,236, and the latter with \$112.50. The repairs for which the whole of this expenditure was required were to be done entirely upon that part of the drain which was within the township of Rochester. The surveyor upon whose report the by-law was founded assessed the lands in Rochester as scheduled in the county by-law, but made no report as to an assessment upon the lands in the other townships, the council of the township of Rochester assuming that they had nothing to do but to charge those townships with and require payment of the proportion of the whole cost of the repairs ascertained in the manner mentioned in the report of the county engineer, as set forth in the by-law of 1883. Notice of the by-law was given to the other townships, but no copy of the report, plans, specifications, assessments and estimates were delivered to them.

Thereupon the townships of Mersea and Gosfield North appealed to the referee upon various grounds, but chiefly on the ground that Rochester had no legal authority to assess or call upon them to contribute anything to cost of repairs to be done within the former township; that the drain constructed under the authority of the county by-law must be kept in repair by each of the townships severally as to that part thereof within its own jurisdiction at its own expense, and that so much of the county engineer's report embodied in the county by-law as assumed to provide that the drain should be kept in repair by a tax on the lands and roads marked in the schedule in the same relative proportion as for construction was unauthorized and void, in so far as it was intended to give to any of the townships interested a right to call upon the other or others for a share of the cost of keeping in repair that part of the drain within its own jurisdiction. The referee determined and reported that the clause referred to in the county by-law was

Judgment.

OSLER,
J. A.

Judgment.

OSLER,
J.A.

unauthorized, and that the appellant townships were entitled to a declaration that they were not liable to pay the "assessment" made against them by the by-law of the township of Rochester, on the ground that such assessment was an illegal and void proceeding.

On the appeal from that report, it was contended before us on behalf of the township of Rochester, that the learned referee had no jurisdiction to entertain the appeals to him; and second, if he had, that the township by-law was valid and based upon the right arising out of the county by-law to charge the other townships with a share of the cost of repairs to that part of the drain within the township of Rochester, proportional to the cost of the original construction.

The Municipal Act in force when the county by-law was passed was the Act of 1883, but it will be more convenient in considering the case to refer to the sections of the Consolidated Act of 1892, [55 Vict. ch. 42 (O.)] which, so far as all the proceedings now in question are concerned, are substantially the same as those of the former Act.

The section which authorized the county by-law is section 598. It enacts that where any works proposed to be constructed in any locality, under section 569, affect more than one municipality, either (1) on account of such works passing or partly passing through two or more municipalities; or (2) on account of the lowering or raising of the waters of any stream contemplated in the proposed scheme of drainage, draining or flooding lands in two or more townships, then the county to which such municipalities belong, on the application of the council of any of the townships affected, and without any preliminary petition from the owners of the property benefited, may pass by-laws for the purposes authorized by the section 569.

Sub-section 2 then declares that unless where contrary to the provisions of the Act, certain specified sections shall apply to the works constructed by the county, and it provides for the constitution of a special court of revision for the trial of complaints in the first instance, instead

of the court of revision, mentioned in sec. 569, sub-sec. 10, that court being composed of three persons, to be nominated by the county council. All complaints against the assessment are to be lodged with the clerk of the county. The sections specially applied are sections 569 (except as modified in regard to the court of revision), to 574, and sections 576, 590, and 591. Section 599 provides that the county shall raise the money necessary for the construction of the works, but each township shall be liable to the county for the amount payable in respect of all the lands within the township, and each township shall pass such by-laws as may be requisite for collecting the amounts assessed against lands or roads within its jurisdiction.

Judgment.

 OGLE,
J.A.

It is not easy to see where any appeal has been given to the referee in the case of a county by-law affecting only minor municipalities within the same county. In the case of such a by-law affecting municipalities within several counties, there are special provisions for the appeal by one county against the other, and the referee then determines as well the proportion of the cost of the work that is to be borne by each of the minor municipalities affected as the proportion to be borne by the counties as between themselves: sections 603, 609. Where the minor municipalities are all within the same county, it would rather seem that (sections 579, 580 and 581 not having been applied) the whole area affected is treated as being a single municipality in which the engineer's assessment is only dealt with in the special court of revision, without any appeal as between the municipalities themselves. This, however, is a point not necessary to be decided here.

It may be noticed that section 576, though applicable to works to be constructed under a county by-law, does not affect the present case. It did not apply to the works constructed by the county, nor was it acted upon, even if it could have been, by Rochester in passing their by-law.

The works then having been constructed and paid for under the county by-law, where is the authority for either

Judgment.

OSLER,
J.A.

of the townships to charge or assess the others with a proportion of the cost of the repairs done to the drain within its own limits?

Section 584 enacts that after any works undertaken under section 598 are fully made and completed, it shall be the duty of each minor municipality to preserve, maintain and keep in repair the same within its own limits in accordance with the requirements of the next preceding section 583, which shall be applicable thereto.

This section I shall refer to in a moment, but first point out that section 577 is one of those which, like the four sections which follow it, has not been made applicable to the case of work done under a county by-law. This section, referring to works constructed under section 575 and 576, extending beyond or benefiting other municipalities than the originating municipality, provides that the engineer or surveyor shall determine and report to the council by which he was employed, whether the works shall be constructed and maintained solely at the expense of such municipality, or whether they shall be constructed and maintained at the expense of both municipalities, and in what proportion.

The county engineer, whose report formed the basis of the by-law of 1883, evidently considered that this section warranted him in reporting that the drain should be kept in repair by a tax on the lands and roads scheduled in each township in the same relative proportion as for the cost of construction. In this I think he was wrong, and that the clause of his report dealing with repairs and maintenance of the drain is of no force or validity whatever. The section is confined to the case of works originated by and carried on between minor municipalities alone. The engineer is required to report to the council by which he was employed, in the alternative, viz., whether the works shall be constructed solely at the expense of that municipality or at the expense of both municipalities, and what proportion. Here the council by whom he was employed was the county council. Clearly it is not

contemplated that the county shall in any event bear the expense of construction and maintenance, and if one alternative is not within the power of the engineer in the case of a county by-law, so also must be the other. The section, therefore, is strictly confined to the case of an initiating minor municipality.

Judgment.
OSLER,
J.A.

The respondents, however, rely upon the reference in section 584 to section 583, as overcoming the difficulty caused by the non-application of section 577 in terms to works undertaken under section 598.

Section 583 is the section which regulates primarily the duties of the several municipalities as between themselves where the work is originated as a township work. Sub-section 1 enacts that after such work, *i. e.*, a township work to which, of course, section 577 applies, is fully made and completed, it shall be the duty of each municipality in the proportion determined by the engineer or referee (as the case may be), or until otherwise determined by the engineer or referee, under the same formalities, as nearly as may be, as provided in the preceding sub-section, to maintain and keep in repair the same within its own limits, either at the expense of the municipality or of parties more immediately interested, or joint expense of such parties and the municipality as to the council upon the report of the engineer may seem just. Then follow a number of sub-sections, dealing with the mode in which the corporation may be compelled to make the necessary repairs, notices, mandamus, appeal, etc. It is contended by the appellants that these words "in the proportion determined by the engineer, surveyor, or referee, as the case may be," draw in and make applicable to the report of the engineer for the purpose of a county by-law under 598, the provisions of section 577. I do not think, however, that we can so construe section 584, which in enacting that the county work shall be kept in repair by the several minor municipalities within their own limits in accordance with the requirements of section 583, merely imports a reference to those provisions of that section which relate to pro-

Judgment.

OSLER,
J.A.

cedure, mandamus, notices, appeals, etc., and the formalities by which each municipality is to raise the money which may from time to time be required to pay for repairs. A clause which is expressly omitted, and, as I have pointed out, for a very good reason from section 598, in the enumeration of those applicable to a county work, cannot consistently with ordinary rules of construction be treated as having been made applicable by the indirect or referential language of section 583. If section 577 is not made applicable to the case of a county work, then, so far as section 583 speaks of "the proportion determined by the engineer," it fails of effect in reference to a county by-law in which there is no power to provide for any apportionment of the cost of repairs and maintenance of the drain.

I am, therefore, of opinion, that those clauses of the by-law of the township of Rochester which assume to assess upon or charge against the other townships any proportion of the cost of works of repair done within their own limits were wholly illegal and unauthorized.

There remains the question as to the referee's jurisdiction to entertain the appeal of the townships from the charge thus sought to be imposed upon them.

This question seems to me to be one of considerable difficulty, and the learned referee arrived at the conclusion that he had jurisdiction "with great hesitation."

Had the case before him been one in which, under some circumstances, or by taking proper proceedings, procuring the report and assessment, etc., by their engineer, etc., upon lands in the other townships, Rochester could have charged or assessed upon those townships a proportion of the cost of the repair of the drain constructed under a county by-law, I think the referee would have had jurisdiction under section 2, clause 5, of the Drainage Trials Act, [54 Vict. ch. 51 (O.)] which confers upon him the powers which the arbitrators formerly possessed under the Municipal Act and the Ontario Drainage Act. It is under that clause, if at all, that the proceedings before him must be supported, and the respondents must shew that he was asked to do something

which, if he had not been substituted for the arbitrators, they might have been asked to do. But could they or could he have varied the report of the engineer so that the proportion of the cost of repair sought to be imposed upon the other townships might have been increased or diminished? See section 8 of 54 Vict. ch. 51 (O.). Clearly this could not have been done if I am right in holding that section 577 does not apply to the case of a county by-law, and therefore that under no circumstances could Rochester have charged the other townships with any part of the cost of repairs to that part of the drain lying within its own limits. The referee's jurisdiction, in short, depends upon the jurisdiction of the township. If they have exercised it wrongly or mistakenly he may review it. But I do not understand that he can entertain an application to set aside or review proceedings which the township had no power under any circumstances to take.

Section 3 of the Drainage Trials Act enacts that "*in all matters before the referee* he shall, subject to appeal, have all the powers heretofore possessed by the High Court and by the arbitrators, respectively, as to determining the legality of all petitions, etc., and of resolutions, reports and provisional and other by-laws: [55 Vict. ch. 57, sec. 1 (O.)]. This, however, must be taken to mean in all matters in which jurisdiction has been conferred upon him or which he may lawfully take cognizance of under the Drainage Trials Act or the Municipal Act. And the same observation applies to section 2, clause 6 of the former, and to section 568a of the latter Act. The jurisdiction which he has under these clauses is incidental merely to his principal jurisdiction.

Sections 6 and 7 of the Drainage Trials Act, and sections 579, 580 and 581 of the Municipal Act are also referred to by the referee, but I do not see that there is anything in them to support his jurisdiction. These clauses of the Municipal Act are not, as I have already said, applicable to the county by-law any more than section 577, and sections 6 and 7 of the former Act relate only to proceedings which may be taken thereunder.

Judgment.

OSLER,
J.A.

Judgment.
OSLER,
J.A.

Section 7 seems to provide for the same case as that provided for by section 6. I have, at all events, been able to discover nothing else to which it can apply. The "assessment" mentioned in that section is not an assessment by the council, but the assessment by the report of the engineer, the very same thing, and in the very same case, that is referred to by the previous section.

The appeal ought, therefore, to be allowed, on the ground that the proceedings before the referee were without jurisdiction, though I agree with his conclusion upon the merits of the case.

As the Court is equally divided upon the former point, the result is that the appeal is dismissed. But as the general merits of the case are with the respondents, I have no objection to concur in the motion that it shall be dismissed with costs.

MACLENNAN, J. A. :—

The great question in this appeal is whether Mersea and Gosfield are bound to contribute to the cost of repairs to be done to the drain in question within the limits of the township of Rochester.

The work was done by the county under section 598, in the year 1883, and in the county engineer's report upon which the by-law for doing the work was founded, he declared that the work should be kept in repair by a tax on the lands and roads mentioned in the schedule in the same relative proportions as for the construction under the provisions of section 585 of the Consolidated Municipal Act, 1883. The lands and roads in the schedule included lands and roads in the three townships of Rochester, Mersea, and Gosfield. The appellants contend that the county engineer was authorized by the section referred to by him, section 585 (now section 583), to make that declaration, and that it is binding on the townships accordingly. Section 584 is very clear that work done under section 598, that is by the county council, shall be kept in repair within its own

limits by each minor municipality, and it declares that this shall be done in accordance with the requirements of section 583, which is made applicable thereto. Of course, the obligation to repair necessarily involves the obligation to pay, and unless we can find some power or right to do so within the statute, one municipality cannot call for any contribution to the cost of repairs done within its own limits from any other municipality. It is contended that such a power and right are to be found in section 583.

Judgment.
MACLENNAN,
J.A.

After a prolonged consideration of the section I am unable to find in it any authority or power for one municipality to claim contribution from another in such a case. The words which it is contended give the right are the words "in the proportion determined by the engineer, surveyor or referee (as the case may be), etc.," down to the words "as provided in the preceding section." Leaving these qualifying words out for the moment, the section says: "Each municipality shall preserve, maintain, and keep in repair the same within its own limits." The meaning of that is very plain. Each is to do all the work within its own limits. Applying that to the present case, Rochester shall do all the repairs required in that township, and so of Mersea and Gosfield. In other words the drain is divided into three defined parts, and one of these defined parts is assigned to each township. Then apply the qualifying words, each is to do it in the proportion determined by the engineer, surveyor, or referee. What proportion is the engineer to determine? The clause has already determined the proportions of the work which each is to do. Each is to do all that is required within its own limits, and there can be no question of proportion as to the work to be done. The suggestion is that proportion means proportion of cost as between the different municipalities. I think it would be stretching the power of construction far beyond any allowable or authorized limit, to hold that such is the meaning of the words, and thereby cast a large part of the expense of repairs done in and by one municipality upon another. There is not a syllable of express reference to such a right of contribution, and the plain words used import the

Judgment. contrary, for they say that the municipality shall keep the same in repair within its own limits either at the expense of the municipality or parties more immediately interested, etc. Then what is the meaning of the words "in the proportion," etc. The section is difficult to construe, and it is strange that it has not been amended since its original enactment in the Drainage Act of 1872, notwithstanding that its obscurity has been pointed out more than once: *White v. Gosfield*, 10 A. R. 560.

MACLENNAN,
J. A.

The best solution which I can suggest is, that these words, that is "in the proportion determined by the engineer," etc., refer to the distribution of the expense between the municipality and the parties more immediately interested. But whether that be the true meaning or not, I find it impossible to hold that it is what is contended for by the appellants.

The section goes on to provide for the manner in which each township shall provide the funds for the work it is to do. It is to do it at the expense of the municipality, or parties interested, or at the joint expense of the parties and municipality as to the council upon the report of the engineer or surveyor may seem just. Now, it is said, this means only its own proportion of the expense. If that be granted, then while the township which does the work has these alternative methods of paying for it, there is no similar provision for the contributing municipalities, and the strange result would arise that while Rochester could provide their share of the money in several alternative ways, the other townships have no such privilege. But these are not the only difficulties. The proportion is to be determined by the engineer. What engineer? Is it the county engineer in a case like the present under section 598, or the engineer of the township doing the repairs, and is it the same engineer who is mentioned throughout the section, in the words, "or until otherwise determined by the engineer," and in the last line, "upon the report of the engineer or surveyor, as may seem just"?

If I could think it possible to hold that proportion meant proportion of cost, I should feel bound to hold that

engineer did not mean the engineer of the original work, but an engineer employed with reference to the works of maintenance and repair. I think that is indicated by the whole language of the clause. It is providing for something to be done after the work is fully made and completed, and for all time to come. It says the proportion is to be determined by the engineer, not once for all, but, "or until otherwise determined by engineer, surveyor, or referee," indicating a new or fresh determination of proportions with an appeal to the referee.

Judgment.
MACLENNAN,
J.A.

Now, if we could find anything in any other part of the Act to assist the contention that the Legislature intended to give a right to call for contribution, we are bound to consider it. I have searched in vain for any such assistance.

It is said that section 577 affords such assistance, but I do not think so. By sub-section 2 of section 598, certain antecedent sections are made applicable to county works, but section 577 is not one of them. That section does apply to the case of works in which more than one municipality is concerned, initiated by a minor municipality, and it very clearly authorizes the engineer to determine and report both as to construction and maintenance, whether they shall be at the expense of the constructing municipality, or of both municipalities. But we have no authority to extend section 577 to work under section 598, and so to supply a defect in the legislation.

The remaining question is as to the jurisdiction of the referee in the appeal before him.

Upon the whole I agree that our judgment must be in favour of the jurisdiction. The foundation of the claim is the report and by-law of 1883, and section 3 of the Drainage Trials Act of 1891 as amended by section 1 of 55 Vict. ch. 57 (O.), extends his jurisdiction to all reports and by-laws relating to drainage, and therefore I think he had power to entertain the appeal and to deal with it as he has done.

The appeal should, therefore, in my opinion, be dismissed.

*The Court being divided in opinion,
the appeal was dismissed with costs.*

GARFIELD V. CITY OF TORONTO.

Municipal Corporations—Sewers—Damages—Act of God.

Where a sewer, built and maintained by a municipal corporation, is free from structural defect and is of sufficient capacity to answer all ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rain-fall, by water backing into the cellar of a person compelled by by-law to use the sewer for drainage purposes.

An extraordinary rain-fall may properly be treated as an act of God, in the technical meaning of that term, though it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence.

Judgment of the Queen's Bench Division reversed.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division.

The plaintiff was the owner of a shop situate on the south side of Queen street west in the city of Toronto, and the drains from the shop were, pursuant to the requirements of a by-law of the city, connected with a sewer, built and maintained by the city, running along Queen street. On the 19th of June, 1892, this sewer, as the result of a very heavy rain-fall, was surcharged with water, and water and filth were forced back into the plaintiff's cellar, destroying a large quantity of goods, and she brought this action to recover damages.

It was tried at the Toronto Fall Assizes of 1893, before STREET, J., and a jury. It was shewn that the storm in question had been a very violent one, nearly an inch and a-half of rain having fallen in twenty-five minutes. In the period of fifty-two years during which meteorological observations for Toronto had been recorded, only two storms approaching it in severity had occurred, one in the year 1850 and the other in the year 1890. No defect in the construction of the sewer was proved, and it was shewn that it was of greater capacity than was required by the standard of engineers for the area drained. It was also shewn that it formed part of the general drainage system of the city. It was contended, however, by the plaintiff that the connection between her drain and the sewer should have been

protected by the city by traps or flaps, but the evidence was conflicting as to the benefit of any device of that kind, and it was shewn that to put in and maintain such a device at every connection would be a matter of great expense. Statement.

STREET, J., withdrew the case from the jury, and gave judgment in the defendants' favour; but the Queen's Bench Division ordered a new trial.

The defendants appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 4th and 5th of December, 1894.

Fullerton, Q. C., for the appellants. The sewer in question is part of the general drainage system of the city, adopted and carried out under the advice and supervision of competent engineers, and it has been carefully constructed and properly maintained. There is, therefore, no right of action against the defendants for the damage resulting, without any negligence of theirs, from this extraordinary rain-fall, which clearly falls within the definition of "act of God."

Reeve, Q. C., for the respondent. The defendants, by their by-law, compelled the plaintiff to make use of this sewer, and the mode of user is under their control. They were bound, therefore, to provide proper safe-guards against such an occurrence as that in question. At all events the fact that a storm just as severe had occurred but two years previously was sufficient to impose upon the defendants the duty of altering the sewer so as to avoid any danger for the future. This storm cannot be called an "act of God," within the meaning of the authorities, for it was not by any means of unprecedented severity, and the question should at least have been left to the jury: *Coghlan v. Ottawa*, 1 A. R. 54; *Derinzy v. Ottawa*, 15 A. R. 712; *Bateman v. Hamilton*, 33 U. C. R. 244; *Maw v. King*, 8 A. R. 248; *Welsh v. St. Catharines*, 13 O. R. 369; *Noble v. Toronto*, 46 U. C. R. 519.

Fullerton, Q. C., in reply.

Judgment. January 15th, 1895. HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.

I am of opinion, as expressed by me years ago in *Noble v. Toronto*, 46 U. C. R. 519, that the mere overflow into the plaintiff's cellar was not *prima facie* evidence for a jury of negligence or of any cause of action.

There was no evidence in this case of any fault in the original construction, some years back, of this Queen street sewer. It was shewn to be above the ordinary dimensions considered to be then sufficient for its purpose, capable of carrying off $1\frac{1}{2}$ inches of rain an hour. But to have been sufficient to carry off such a rain-fall as caused this damage, it would have to have been three times its actual size, that is for a down-pour of even two inches in an hour.

As to trapping or flaps the evidence was all one way, that such a course might possibly be practicable, but that the cost would be enormous, requiring an army of men to look after them. Mr. Keating and his assistant say it might be possible to prevent overflow for the private owner to put in a staple valve to prevent water backing up. The valve would be in the house or on the owner's premises.

There was no attempt on the plaintiff's part in any way to contradict or qualify this evidence. No expert or mechanic was called to prove or even to suggest any means of prevention at any reasonable effort or cost, or at any cost whatever, and the learned Judge rightly, as I think, considered it was not disputed so as to be proper for the jury. I think it clear that it is not sufficient for witnesses to say generally, that these overflows can be prevented, unless such prevention is brought within reasonable bounds. It may be assumed that by unlimited expenditure of money and labour most physical difficulties in engineering can be overcome. Such, for instance, as an enlargement to a threefold size, the placing of thousands of traps or flaps at the points of junction of the private drains with the main sewer and an army of men to watch, guard and regulate their action. But we have always to

consider the whole circumstances attending the construction of municipal works, and the due regard to be had to the ways and means and the nature and amount of the service for which they are constructed.

Judgment.

HAGARTY,
C.J.O.

As Lord Justice Mellish says in *Nichols v. Marsland*, 2 Exch. D. at p. 6: "In the late case of *Nugent v. Smith*, 1 C. P. D. 423, we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it." See on this Beven's *Law of Negligence*, p. 573. This point is closely connected (if not almost identical) with the duty of adopting precautionary measures. The learned Judge here considered there was nothing to lead to the belief that the corporation from previous experience should have anticipated the recurrence of overflow.

Fry, L.J., in *Nitro-Phosphate, etc., Co. v. London and St. Katharine Docks Co.*, 9 Ch. D. 503, at p. 515, says: "I do not think that the mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence—when, in other words, it does not imply any law from which its recurrence can be inferred—places the phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within that rule it is not, in my opinion, necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated." He says the same view was taken by Mellish, L.J., in *Nichols v. Marsland*, 2 Exch. D. 1. Once before in the *Nitro-Phosphate Company's* case, the tide had (a year before the accident) risen nearly as high.

In *Nichols v. Marsland*, 2 Exch. D. 1, the jury had found not only that there was no negligence in the construction or maintenance of the reservoir, but that the flood was so great that it could not reasonably be anticipated, although, if it had been anticipated, the effect might have been pre-

Judgment. vented. This seems to be, in substance, a finding that the escape of the water was owing to the act of God.

HAGARTY,
C.J.O.

There was some evidence of the insufficiency of the artificial weir in one of the pools for carrying off the water.

In *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418, the Court fully approved of Lord Justice Fry's doctrine.

As to the claim that the defendants were bound to provide new or larger sewers, where the existing sewers were originally well designed and sufficient, I refer to the late case of *Stretton's Derby Brewery Co. v. Mayor of Derby*, [1894] 1 Ch. 431, which was very fully argued and decided by Romer, J. The case is very instructive. *Blyth v. Birmingham Water Works*, 11 Exch. 781, is there cited; also *Whitehouse v. Birmingham Canal Co.*, 27 L. J. Exch. 25.

In *Ruck v. Williams*, 3 H. & N. 308, at p. 318, Bramwell, B., said: "If the only negligence here imputed to the commissioners had been negligence * * in not making (the sewer) stronger than they did, inasmuch as the damage resulting * * only accrued by reason of there being an extraordinary storm, I should have said that there was no negligence or wrong in not anticipating that which could not be anticipated, and consequently no liability." But on another ground, that a flap or penstock which had been at the sewer's mouth had been removed by the defendants and not replaced, he held them liable.

The same learned Judge said in *Nichols v. Marsland*, L. R. 10 Exch. 255, at p. 258: "No doubt not the act of God, or a *vis major* in the sense that it was *physically* impossible to resist it, but in the sense that it was *practically* impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But these are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community."

It is well to remember that these words are used as to reservoirs and banks erected in a pleasure ground for ornamental purposes. Applied to works of necessity authorized by law and executed by a municipal body for public purposes, they seem to have a treble weight and significance. I refer to the judgment of my brother Ferguson in *Johnston v. Toronto*, 25 O. R. 312, commenting on a judgment of Cooley, C.J., in *Detroit v. Beckman*, 34 Mich. 125, as to submitting matters of this character to juries.

Judgment.
HAGARTY,
C.J.O.

On the whole, I see no evidence of either of the grounds or charges on which the plaintiff claimed. There was nothing proved against the proper construction or maintenance of the sewer or in not using some means to prevent the overflow. No means of prevention within the bounds of reasonable care or practical remedy was in fact suggested.

I consider there was no evidence which the Judge was bound to submit to the jury. If he had so submitted it and the jury had found for the plaintiff, I think it is a case in which the Court must have interfered on the ground of no evidence, or that it was not a verdict that could have reasonably been arrived at by reasonable men.

I have, so far, treated it as if it had been a non-suit.

The learned Judge, in fact, dismissed the jury, leaving it as a case to be considered as tried by the Court. But my opinion rests not on this. It was pressed on us in argument that as the plaintiff was compelled by law to drain into the public sewer, the duty of the corporation was thereby much enlarged.

I find that a similar liability exists under the Municipal Acts on which most of the modern sewer and overflow cases have been decided.

The Public Health Act [38 & 39 Vict. ch. 55, secs. 21, 23 (Imp.)] is clear on that point. The Metropolis Local Management Act of 1855 [18 & 19 Vict. ch. 120, secs. 73, 74, 75 (Imp.)] is to same effect.

I think that the appeal must be allowed.

Judgment. BURTON, J. A. :—

BURTON,
J. A.

I agree with my brother Maclellan, that if there was evidence proper to submit to a jury, the Divisional Court should have dealt with the case by giving the judgment which the learned Judge should have given and assessed the damages, if they thought that the evidence warranted a recovery.

I agree with him also, that the evidence discloses no negligence in the original construction of the drain or its maintenance and that it did not appear that any notice was brought home to the defendants of the liability to an occurrence of the kind by previous floods.

I think, therefore, that the enquiry confines itself to the question whether, as the property owner has no option, but is compelled by law, and that law one of the defendants' own making, to use the sewer, any change in their liability is effected, or whether, under these circumstances, it is negligence to omit to provide flaps or other appliances to prevent the flooding of the premises so drained.

It seems, I think, to be reasonably clear that under Acts of the Legislature, similar to those which were in question in *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418, no action will lie except for negligence in the construction or maintenance, although Lord Coleridge does suggest a possible distinction where the duty was not absolutely imposed upon the parties. There may be such cases as in *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193, but I think there is no distinction between such cases as *Dixon v. Metropolitan Board of Works*, and the present case, for the reason I am about to give.

I think we are too much in the habit of overlooking the fact that the municipal councils are granted legislative powers; that, in point of fact, the Legislature has largely delegated to them the power of enacting laws within their respective limits, and a law passed by them within jurisdiction thus conferred is as binding as an Act of Parliament. It is quite true they need not legislate,

but if they do it forms as complete a protection for anything done under it as if it had been expressly authorized by Act of Parliament.

Judgment.

BURTON,
J.A.

Compelling all parties to drain into the sewer appears to be a very reasonable exercise of power, both on sanitary and many other grounds which might be suggested.

If a statute gave such a power, leaving the council to use its own discretion whether to avail itself of it or not, I apprehend there could be no doubt it would be a complete answer to an action, unless negligence was averred and proved.

Is it then negligence to omit the use of a flap or other such appliance as is referred to in the evidence?

In the first place, it is not required in the law under which they did the work and compelled the connection. It is difficult to understand how there was any negligence in not adopting what are suggested by some of the witnesses as remedies which are at best but experiments, and which, if really of value, might have been adopted by the proprietors themselves.

I think there was no such duty on the defendants, and consequently there was no negligence in the omission, and I am of opinion therefore that the learned Judge was right in entering judgment for the defendants.

OSLER, J.A. :—

I, with some hesitation, agree in allowing this appeal.

MACLENNAN, J. A. :—

The defendants are authorized by statute to construct sewers, and to require adjacent owners to drain their properties into them. The sewer in question was constructed many years ago, and no defect was shewn either in its construction or maintenance. In 1868 the city passed a by-law, No. 468, for the construction of sewers, and required adjacent properties to be drained into them. The by-

Judgment. law was amended in 1869, and again in 1882, by another
MACLENNAN, by-law, numbered 1150. By section 2 of by-law 468, as
J.A. amended in 1869, all grounds, gardens, vacant lots or other
properties abutting on any street containing a common
sewer shall be drained into the sewer. By section 5 all
private drains shall be in such shape and form, and shall
be connected in such manner and place with the common
sewer, as shall be directed by the Board of Works. By
section 10, a rent may be charged to owners for the use of
sewers. By section 16, the Board of Works may drain
any ground, etc., into the common sewer at the expense of
the owner in case he omits to do so, and by section 19, a
penalty is provided for infraction of the by-law. By sec-
tion 1 of the amending by-law, 1150, sewer connections
and private drains may only be made by corporation con-
tractors on the order of the City Engineer, and by section
3 the city contractors making such drains and connections
are limited to the street line, and may not carry their work
beyond its limits or upon the premises of the landowner.
Another by-law, No. 2478, was passed in 1890, with
reference to the alteration of the drainage, etc., system of
any building, but as the building in question was erected
and the sewer connections were made in 1884, this later
by-law seems to have no bearing on the case.

The effect of the by-laws, therefore, so far as applicable,
seems to be this. The landowner could not choose but to
drain into the sewer. From the sewer to the street line,
but no further, the private drain was the property and
the work of the city, to be done by its own contrac-
tors. Beyond the street line, and upon the premises
of the owner, the drain was the property of the latter
and to be constructed by himself, and as to that part
of it all the authority the city assumed over it was as
to its shape and form, and the manner and place of its
connection with the common sewer. The shape and
form, and manner of connection, may be prescribed and
controlled by the city, but it has nothing to do with the
construction beyond the street line; the latter is to be the

work of the owner. We must assume, therefore, that the drain of this house was as to its shape and form such as was prescribed by the city, and was connected with the common sewer and constructed up to the street line by them, but beyond that line was constructed by the owner.

Judgment.
MACLENNAN,
 J.A.

Now, everything that was done by the city was authorized by the Municipal Act, and it is well settled law that in the absence of negligence it is not answerable for damages in such a case: *Hammersmith R. W. Co. v. Brand*, L. R. 4 H. L. 171; and the only question in this case is whether the defendants were shewn to be guilty of such negligence. The learned trial Judge came to the conclusion that they were not, and, with great respect for the learned Judges of the Divisional Court, I think he was right. I agree with him that the rain storm which caused the sewer to be overcharged with water was so extraordinary and unusual that the defendants could not be expected to anticipate it, and that it comes within the class of occurrences described as *actus Dei*. I do not think I need add anything to what the learned Chief Justice has said on this point, but I may refer to a case which, I think, has not been cited by him, viz., *Madras R. W. Co. v. Zemindar of Carvatenagarum*, L. R. 1 Ind. Ap. 364.

It was also contended that the city was guilty of negligence in not using some contrivance of valves or flaps which would prevent the back flow of sewage into the private drain. In *Vaughan v. Taff Vale R. W. Co.*, 5 H. & N. 679, Willes, J., said that negligence is absence of care, according to circumstances. I think the evidence is overwhelming that there is nothing within reasonable limits of expense which the city could use or apply outside of the street line for such a purpose, and therefore, that if anything of that kind can be applied, it can only be done in or upon the premises of the owner. I do not see that there is any duty upon the city in the circumstances to provide against the inflow of sewage at all hazards, any more than to provide against the inflow of sewer gas. Unless the householder inserts traps of some kind in

Judgment. his drains, sewer gas will invade his premises from the
MACLENNAN, J.A. common sewer, and it seems to me that the duty is the same as to both.

I think that the appeal should be allowed, and that the action should be dismissed.

Appeal allowed with costs.

CLARKSON V. MCMASTER.

Bills of Sale and Chattel Mortgages—Possession—Creditors—Assignments and Preferences—55 Vict. ch. 26, sec. 4 (O.).

The creditors against whom by section 4 of 55 Vict. ch. 26 (O.) taking possession under a defective chattel mortgage is declared to be of no avail, are creditors having executions in the sheriff's hands at the time possession is taken, or simple contract creditors who, at that time, have commenced proceedings on behalf of themselves and other creditors to set aside the mortgage, or an assignee for the general benefit of creditors who, however, stands in no better position; and possession taken before the assignment, cures all formal defects.

Judgment of MACMAHON, J., reversed, HAGARTY, C.J.O., dissenting.

Statement. THESE were appeals by the defendants from the judgment of MACMAHON, J., at the trial in the plaintiffs' favour, and by the plaintiffs from the judgment of the same learned Judge dissolving an interlocutory injunction.

On the 10th of October, 1893, the defendants took a chattel mortgage from A. L. Davis upon his stock-in-trade to secure his indebtedness to them. One of the terms of the mortgage was that the mortgagees might take possession of the stock-in-trade if the mortgagor failed to pay on account of the debt \$50 per week, and it was agreed that if the payments were kept up the mortgage would not be registered. It was not registered, and default having been made in payment, the defendants, on the 7th of November, 1893, took possession. On the 13th of November, 1893, Davis made an assignment for the general benefit of his creditors to the plaintiff Clarkson, who, on the following

day, commenced this action to set aside the mortgage. An *interim injunction* to restrain the sale was obtained *ex parte*, and on the 22nd of November, 1893, a motion to continue the injunction was dismissed by MACMAHON, J., on the ground that the facts had not been fully disclosed when the *ex parte* injunction was obtained. On the 28th of November, 1893, the plaintiffs sold the goods in question. On the 8th of December, 1893, Herman Wolff & Co., simple contract creditors of Davis, were joined as parties plaintiffs suing on behalf of themselves and other creditors of Davis.

The action was tried at Hamilton on the 16th of January, 1894, before MACMAHON, J., who found that the mortgage had been taken by the defendants in good faith, believing that Davis was in "good financial condition," but he set it aside on the ground that it was invalid for want of registration.

The defendants appealed from this judgment, and the plaintiffs appealed from the order dissolving the injunction, and the appeals were argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 29th of November, 1894.

Johnston, Q. C., and W. H. Cutten, for the defendants. It was settled law that, before the amending Act 55 Vict. ch. 26 (O.), possession taken by the mortgagee cured all formal objections to a chattel mortgage: *Parkes v. St. George*, 10 A. R. 496; *Ross v. Dunn*, 16 A. R. 552. The only question then is as to the effect of section 4 of the amending Act. That section means merely that creditors who commence proceedings before possession is taken are in the same position as execution creditors, and that after action has been taken it is too late for the mortgagee to go into possession. To give it any wider construction would make a simple contract creditor's position stronger than that of an execution creditor. In the same way it is

Argument. only an assignee appointed before possession taken who can complain. In this case the plaintiffs are too late: *Gillard v. Bollert*, 24 O. R. 147; *Meriden Britannia Co. v. Braden*, 21 A. R. 352.

Cassels, Q. C., and *W. S. McBrayne*, for the plaintiffs. The word "creditors" as used in section 4 must mean more than execution creditors, for as to execution creditors no amendment was necessary. It must be used in the ordinary sense of persons having claims, and should not have the added limitation attempted to be placed upon it, of creditors who have brought an action. Here the action was brought before sale, and the election to attack can be made at any time before title goes out of the mortgagees. Under section 7 of the Assignments Act the assignee has all the rights that the creditors would have were there no assignment. This was, on the evidence, a fraudulent preference.

Johnston, Q. C., in reply.

January 15th, 1895. BURTON, J. A. :—

As to the point raised at the hearing as to the security being void under the Assignments and Preferences Act there is no doubt that the debtor was in point of fact insolvent when he executed the mortgage, and it may be difficult to believe that he was not aware of it; still he swears that at the time he gave it he thought he could pay all his creditors in full, and that he had no idea at that time of making an assignment, whilst the creditor swears that at the time of taking the security he had not the slightest reason to doubt his solvent condition, and he says from the figures given to him he saw no reason why, if those figures were truthful, he should not go on. He admits it is true that if he had not given the security he would not have got the additional goods he got upon that occasion, and that he then insisted upon getting the security, and he winds up his evidence by repeating that he believed he was in a perfectly solvent condition.

McMaster & Co. were by far his largest creditors, and had furnished, it is said, about half his stock.

Judgment.

BURTON,
J.A.

It is said that the statement the debtor furnished to his creditors contained internal evidence that he was not solvent, a large portion of his indebtedness being overdue, and that McMaster & Co., must or ought to have known this. This was, no doubt, a piece of evidence which was made the most of before the learned trial Judge, and if the question had been submitted to a jury upon the same evidence, no Court would have interfered with their finding.

Here there is no conflict of evidence; both debtor and creditor swearing that they had no idea of insolvency. Any doubt there may be is raised by the statement, which it is said should have led the creditor to a different conclusion. Even if there had been a conflict of evidence "the finding of the primary judge" as laid down in *Grassett v. Carter*, 10 S. C. R. 105, at p. 125, "is to be regarded as decisive, and should not be overturned in appeal by judges who have not had the advantage, as the judge at the trial had, of seeing the witnesses and observing their demeanour under examination."

If the debtor had sworn that he was insolvent to the knowledge of his creditor, and the learned Judge had, nevertheless, adopted the creditor's denial, the decision, according to *Grassett v. Carter*, should be decisive. Is more weight then to be given to a statement which might, and to some minds would, have fixed the creditor with the knowledge of his debtor's circumstances than the evidence of the debtor?

I can quite understand the distinction drawn by Mr. Justice Strong when he refers to a decision dependent altogether on inference to be drawn from documentary evidence or undisputed facts, but this is not a case of that kind.

I am of opinion, therefore, that we ought not to interfere with the Judge of first instance upon this point even if we differed from him.

Then on the other point: The Act in question (Assign-

Judgment.

BURTON,
J.A.

ments and Preferences Act) having been held to be *intra vires*, the assignee was the only proper party to bring the action.

In the reasons of appeal Wolff & Co. are referred to as simple contract creditors suing on behalf of themselves and other creditors, but there is a two-fold answer to their claim, that as there was an assignment they had no *locus standi* to impeach this transaction on the ground on which it is impeached, whether suing individually or on behalf of themselves and other creditors; and secondly, that the goods comprised in the mortgage were sold before their action was brought.

It was the law of this Court before the passing of the Act of 1892, that although a mortgage might be void as against creditors under the Chattel Mortgage Act, so long as there was no one in a position to impeach it by seizing under an execution, it was competent to the mortgagee to perfect his title by taking possession. The Legislature has in the Act in question declared that the words "void as against creditors" shall extend to creditors suing on behalf of themselves and other creditors and to any assignee for the general benefit of creditors as well as to execution creditors.

But a creditor suing on his own behalf is in no better position than he was before the Act, and is powerless unless he obtains execution before possession taken.

I do not think it necessary to hazard any opinion as to the meaning of the words "creditors or purchasers or mortgagees" in the fourth section. All we are dealing with here is the right of the assignee; he is neither a creditor, purchaser or mortgagee, who became so before such taking of possession.

It was intended to place the creditor suing on behalf of all creditors and an assignee representing all creditors on the same footing as an execution creditor, so that if such a creditor had commenced a suit or an assignee had been appointed before the taking of possession, the mortgage might not be validated as against them.

The assignee was not appointed until after possession had been taken and can be in no better position than an execution creditor would have been in before the Act.

Judgment.
BURTON,
J.A.

I think, therefore, that the judgment appealed from is wrong and that the appeal should be allowed.

This being my view of the case upon the merits, the injunction would have been dissolved at the hearing. The learned Judge, in his final judgment, states that it was so dissolved on the ground that the Assignments and Preferences Act was supposed to be *ultra vires*, although a different reason is given in the judgment dissolving it. It is clear, however, that the judgment dissolving it must be affirmed, although I must add that I do not see that any blame attaches to the appellants for there being two appeals, inasmuch as they were appellants in the one and respondents in the other.

For the reasons given, I think we must reverse the judgment on the main question, and that being so the plaintiffs' appeal fails.

OSLER, J. A.:—

Section 1 of R. S. O. ch. 125 enacts that a chattel mortgage which is not accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged, shall within five days from the execution thereof be registered in the prescribed manner. And section 4 of the same Act enacts that in case the mortgage is not so registered it shall be absolutely null and void against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

Under the law as it then stood it had been held, and I think, as far as this Court is concerned, the law was settled, (1) that the words "void as against creditors" must receive the interpretation usually given to them in Acts of this nature and be read "voidable"; (2) that the word "creditors" meant execution creditors, creditors who were in a position

Judgment.

OSLER,
J.A.

to seize the goods mortgaged, persons who were on the same plane as the subsequent mortgagees or purchasers, as having an actual charge or lien upon the goods embraced in the defective mortgage; and (3) that if the mortgagee in such defective, though honest mortgage, had actually taken possession of the goods under it before an execution was lodged, the execution creditor came too late, and the title of the mortgagee to the goods prevailed. *A fortiori* if the goods had been sold under the mortgage before the execution came in, the latter had no claim. I refer to *Parkes v. St. George*, 10 A. R. 496; judgment of the majority of the Court; *Smith v. Fair*, 11 A. R. 755; *Meriden Britannia Co. v. Braden*, 21 A. R. 352. One member of this Court, my late brother Patterson, was, however, always of opinion that the mortgagee could not by his own act alone on taking possession of the goods defeat the subsequent execution, though a taking possession with the assent of the debtor, or as the joint act of both parties, would do so.

The law then being as I have stated, the Act of 55 Vict. ch. 26, was passed. Sections 2 and 4 are the only ones which need be referred to. Section 2 enacts that in the application of the said Act, *i. e.*, R. S. O. ch. 125, and of this Act extending and amending the same, the words "void as against creditors" in the said Act, shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors, within the meaning of the Act respecting Assignments and Preferences by insolvent persons, and amendments thereto, as well as to creditors having executions against goods and chattels of the mortgagor or bargainor in the hands of the sheriff.

This section, therefore, explains and extends, or interprets the meaning of the words "void as against creditors" in the principal Act, and declares that the creditors against whom a mortgage, defective for non-compliance with the provisions of that Act, shall be void, are—not all creditors—but creditors suing on behalf of themselves and other

creditors and any assignee for the general benefit of creditors as well as creditors having executions.

Judgment.

OSLEE,
J.A.

These are the three classes of persons who have the right to attack the mortgage for any formal defect. Where the execution creditor could have attacked it there the creditor without an execution, but suing on behalf of himself and others, or the assignee under the Act, may also do so.

Then section 4 deals specially with the incident of the taking possession by the mortgagee under the defective mortgage, and enacts that a mortgage declared by the said Act, that is the R. S. O. ch. 125, to be "void as against creditors," as now interpreted by section 2 of the amending Act, and subsequent purchasers or mortgagees, shall not by the subsequent taking of possession of the things mortgaged by or on behalf of the mortgagee be thereby made valid as against persons who became creditors or purchasers or mortgagees before such taking of possession. What is the meaning of the word "creditors" in this section? The plaintiffs contend that it means simply persons to whom the mortgagor was indebted before the taking of possession, and who bring their action at any time after the possession has been taken so long as the goods remain in the hands of the mortgagee, and not merely creditors who were then, that is to say, before possession taken, suing on behalf of themselves and other creditors; and it is said that the section would have no meaning or effect unless it was thus construed. The word "creditors" must, however, have the same meaning wherever it is used in both sections. It admits of no other construction when the object and intention of the amendment are considered. It was intended to put simple contract creditors (to use the language of section 2), when suing on behalf of themselves and others, and the assignee, on the same footing as execution creditors, that is as regards their right to take advantage of formal defects in chattel mortgages, and we so held in *Meriden Britannia Co. v. Braden*, 21 A. R. 352. That was one thing, and that is the general provision, without regard to any particular defect in the mortgage or any-

Judgment.

OSLER,
J.A.

thing by which a defect might appear to be surmounted. Then it was further intended to deal with the question of taking possession, and section 4 declares that a subsequent taking of possession of the things mortgaged by or on behalf of the mortgagee shall not cure a mortgage declared by the principal Act to be "void as against creditors," as interpreted by section 2—against whom?—against persons who became creditors, surely the very creditors against whom the mortgage is to be void, that is to say, creditors suing on behalf of themselves and others, as well as execution creditors, or, an assignee, before such taking of possession. That is the period of time at which the creditor's rights are to be fixed. If he acquires the necessary character before possession taken, then taking possession will not help the mortgagee any more than it would have done against an execution creditor. The creditor is on the same footing as purchasers or mortgagees before such possession taken, and that the section places him on that footing is a strong indication that it is the execution creditor or creditor suing on behalf of himself and others who is meant by the section.

It was said that the section would have no meaning, or no effect or operation unless "creditors" was taken to mean persons who are creditors merely before possession was taken but that is not so. Doubtless, the section was not needed to confer a right upon persons who had become execution creditors or purchasers or mortgagees before taking possession. Possession taken by the mortgagee was never held to affect rights already acquired by such persons. But now the word "creditors" has the larger meaning, and full effect is given to the section by holding that the extended class as mentioned in section 2 are no more to be affected by the taking possession than were persons who had previously thereto become execution creditors, purchasers or mortgagees. The Act does not extend the meaning of the term execution creditor, and it could hardly have been intended that he should be placed in a worse position than

the simple contract creditor, who was that and nothing more, when possession was taken, but who, if the present contention is right, may, by suing years after possession taken, on behalf of himself and other creditors, acquire a right against the goods that even the execution creditor coming in in the same way never had. "Creditors," in short, in the latter part of section 4, means those persons against whom the mortgage is declared by the principal Act to be void, and section 2 is the interpretation clause which defines who such persons are. Possession taken before any person having that character appears on the scene is not affected by the 4th section, and continues to have the operation it has hitherto been held to have. I agree with the opinion of my brother Ferguson in *Gillard v. Bollert*, 24 O. R. 147, as to the meaning of this section, and am therefore of opinion that the appeal should be allowed. Being of that opinion, it follows that the plaintiffs' appeal from the order refusing to continue the injunction should be dismissed.

Judgment.

O'LEER,
J.A.

It is certainly not clear looking at the judgment at the trial exactly on what ground the other judgment went. But I may say that I have been unable to discover in the affidavits or papers any such improper suppression or non-disclosure of facts as would have justified a refusal to continue on that ground alone. I may just add with reference to other points taken by the plaintiffs on the argument before us as to the insolvency of the debtor and the *bona fides* of the defendants that these points were both expressly determined in favour of the defendants by the learned trial Judge. The evidence ought to be very clear indeed to warrant us in disturbing such a finding. This Court has recently held by a majority that the presumption of intent arising from the date of the instrument in connection with the date of the assignment is a rebuttable presumption and I am satisfied that there was evidence here which amply justified the learned trial Judge in holding that it was rebutted in the present case.

Judgment. **MACLENNAN, J. A. :—**

MACLENNAN,
J. A.

[The learned Judge first dealt with the plaintiffs' appeal and came to the conclusion that there had been no suppression of facts, and that the injunction should not have been dissolved on that ground. He then continued :]

The defendants contended that the learned trial Judge was wrong in holding that possession having been taken before the action was brought was no defence; and the respondents on the other hand insisted that the mortgage was void as against the assignee as a fraudulent preference.

I think the appellants' contention well founded. The question depends on the effect of the Act 55 Vict. ch. 26 (O.), amending R. S. O. ch. 125, the Act respecting Mortgages and Sales of Personal Property.

By section 4 of R. S. O. ch. 125, unfilled mortgages are declared to be void against creditors, unless followed by immediate and continued possession. It was held in this Court in *Parkes v. St. George*, 10 A. R. 496, and other later cases, that the creditors there referred to are creditors in a position to seize the goods, *i.e.*, execution creditors, and that if possession was taken before execution issued, the omission to file was cured. Section 2 of the Amending Act declares that the words "void as against creditors" shall extend to simple contract creditors of the mortgagor suing on behalf of themselves and other creditors, and to any assignee for creditors. The effect of this is, reading section 4 of the principal Act and section 2 of the amending Act together, that unfilled mortgages are now void as against not only execution creditors, but also against simple contract creditors suing on behalf of themselves and other creditors, and against an assignee for creditors.

The mortgage in question, therefore, not having been filed, could be attacked either by a creditor suing on behalf of himself and other creditors, or by the assignee. The present action presents both of these features, and it must succeed unless it is a good defence to say, as the fact is, that before the action was brought either by the as-

signee for creditors, or by the creditor suing on behalf of himself and other creditors, the mortgagee had taken possession. That question depends on section 4 of the amending Act, which declares that a mortgage declared void by the principal Act as against creditors shall not by the subsequent taking of possession be thereby made valid as against persons who became creditors before such taking of possession. It was contended by the respondents that the word "creditors" in the concluding portion of this section meant any creditor whatever, and that inasmuch as the plaintiffs Wolff & Co. were creditors before the taking of possession, that act did not validate the appellants' mortgage as against them. I think, however, that we ought not to give so wide and general a meaning to the word. I think it must bear the same meaning in both parts of the section, and that in the first part it clearly means the two classes referred to in section 4 of the principal Act, and in section 2 of the amending Act, namely, execution creditors and creditors suing on behalf of themselves and other creditors. The plaintiffs Wolff & Co. were not such creditors before possession taken, for they had not yet brought any action. Therefore, in my opinion, section 4 does not help them, and I think they cannot maintain this action under the provisions of the Chattel Mortgage Act. I think the assignee for the creditors is in the same position. Apart from section 4 of the amending Act, the same reasons on which it was held that possession taken before execution validated an unfiled mortgage as against creditors, apply as against an assignee, for he can stand no higher than the creditors, and the right of action given by section 7 of the Assignments Act is merely the right which might otherwise have been exercised by them.

Judgment.
MACLENNAN,
J.A.

Again, if section 4 of the amending Act is invoked by the assignee as a subsequent purchaser, the answer is that possession was taken before the assignment and therefore before he became a purchaser. I am, therefore, of opinion that so far as the action depends on the Act relating to mortgages and sales it cannot be maintained.

Judgment. I have had some doubt on the question whether the mortgage was not void under the Assignments Act, but upon the whole I think we cannot disturb the finding on that point of the learned trial Judge. The appeal should therefore be allowed.

MAOULLENAN,
J. A.

HAGARTY, C. J. O. :—

I think that we must give the words in section 4 their natural and ordinary meaning, especially considering the apparent object of this amendment to the law. Persons who became creditors prior to the taking of possession can hardly be read to mean execution creditors, as the execution would, of course, defeat the possession. But it is also urged that it should mean the class mentioned in section 2 as "creditors suing on behalf of themselves and other creditors," as well as to creditors having executions. The clauses are quite distinct, and the second includes assignees as well as creditors suing, etc.

The fourth section is directed altogether against one object, viz., the taking of possession, and the legal effect theretofore given to it, which we must assume that the Legislature, in pursuance of the general design for equal distribution of a debtor's assets, wished to deprive of its power to render good an unregistered mortgage.

If we hold as appellants desire, I think we will almost wholly defeat what I think is the clear intent of the Act. Confining its operation to creditors suing on behalf of themselves and others will be limiting the clause to a very small class. It can hardly be narrowed down to a creditor suing on behalf of himself and other creditors to set aside the mortgage itself, yet the clause is directed to the three classes, creditors, purchasers or mortgagees claiming against the property so taken possession of.

I think that the appeals must be both dismissed.

*Defendants' appeal allowed with costs,
HAGARTY, C. J. O., dissenting, and
plaintiffs' appeal dismissed with costs.*

THE LAND SECURITY COMPANY V. WILSON.

Principal and Surety—Novation—Sale of Land—Varying Terms of Agreement—Release of Lots—Interest.

An agreement for sale and purchase of several lots, entered into between the plaintiffs and the defendant, described the lots by their plan number, and after providing for payment of the purchase money part in cash and part at times fixed therein with a right of prepayment, contained the words: "Company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The defendant sold and assigned his interest in the agreement to a third person who made several payments to the plaintiffs, and sold several lots and parts of lots which were conveyed to the purchasers by the plaintiffs, who did not first insist upon payment of all interest, and who also on one occasion gave time to the third person for payment of interest:—

Held, 1. That there was no novation, the relations which the defendant himself created between the plaintiffs and the third person sufficiently accounting for the dealings between them.

2. That the proportion of the purchase price applicable to each lot was to be ascertained by dividing the balance of purchase money, after deducting the cash payment, by the number of lots.

3. That the plaintiffs were not entitled to convey lots without requiring payment of all interest in arrear at the time of each conveyance, and interest to the date of the conveyance upon the portion of principal being paid.

4. That though the plaintiffs had no right to convey parts of lots, or to convey without requiring payment of interest, the defendant, even if merely a surety, was not wholly released by their doing this, and giving time for payment of interest, but was released as to interest in arrear when lots were conveyed and time was given, and was entitled to credit for the full proportion of purchase money of those lots of which parts had been conveyed.

Judgment of ROBERTSON, J., reversed.

THIS was an appeal by the plaintiffs from the judgment of ROBERTSON, J.

On the 20th of March, 1889, the plaintiffs and the defendant entered into the following agreement:

"Memorandum of agreement made in duplicate the 20th day of March, A. D. 1889, between William D. Wilson, of the city of Toronto, in the county of York, vinegar manufacturer, of the first part, and The Land Security Company, hereinafter called the Company, of the second part:

"Witnesseth, that the said party of the first part agrees to buy from the said Company and the said Company agrees to sell to the said party of the first part block T of the Davenport property in the township of York, now in the

Statement. city of Toronto, according to plan No. — to be filed in the Master of Titles' Office, of the county of York, for the price of twenty-three thousand dollars, amounting to \$23,000, the sum of twenty-five hundred dollars being now paid in cash and the balance of \$20,500 to be paid as follows: That is to say: The further sum of \$2,500 on the 20th day of September, A. D. 1889, and the balance of \$18,000 at the expiration of five years from the date of these presents, and interest in the meantime on the remaining unpaid principal at the rate of six per cent. per annum, payable half-yearly. The first of such half-yearly payments of interest to become due and be paid on the 20th day of September, A. D. 1889, to be secured by a first mortgage on the premises. The Company to give the deed free of expense; and release said lot from all encumbrances except said first mortgage whenever \$10,000 of the purchase money shall have been paid; said party of the first part if mortgage is required to pay the expense thereof, which shall be drawn by the Company; said party of the first part shall search the title and procure copies of any title deeds he may require at his own expense. The Company to be bound to shew or make good only such title to said lands as is held by the Company. Time shall be of the essence of this agreement. The deed shall contain a covenant which provides that no business creating a nuisance shall be carried on upon the premises. Prepayments may be made at will. Company will discharge any of said lots on payment of the proportion of the purchase price applicable on each.

“Witness, etc.”

The other agreement, which purported to be a duplicate, did not contain the words at the end “applicable on each.”

The plan referred to in the agreement was filed by the plaintiffs in due course in the Land Titles office. In block “T” there were fifty-five lots, fronting on four streets, and not of uniform size.

The defendant paid the instalment of \$2,500 due on the 20th of September, 1889, and interest to that date, and on

the 2nd of December, 1889, assigned to Elmes Henderson Statement
all his interest in the agreement and in the lands therein described. The assignment was drawn by the plaintiffs, and was registered in their books, and they received at the time a fee of \$1. The assignment was endorsed on the agreement, and was as follows :

" In consideration of the sum of \$32,472 of lawful money of Canada to me paid by Elmes Henderson of Toronto, barrister, (the receipt whereof is hereby acknowledged), I, the within named William D. Wilson, do hereby grant, sell, assign, transfer, quit claim and set over unto the said Elmes Henderson this the within written agreement in duplicate and all my right, title and interest therein and thereto, and to the land and premises therein agreed to be bought and sold.

" Signed, sealed and delivered at Toronto this 2nd day of December, A. D. 1889."

There was no written assent by the plaintiffs to this assignment, and there was a conflict of evidence as to what took place when the assignment was made, but in their ledger account with the defendant the plaintiffs added the words " now Elmes Henderson."

The plaintiffs and Henderson, without communication with Wilson, then agreed upon a schedule of prices to be paid for releases of the lots, the amounts being based on the supposed values of the lots, and not being arrived at by merely dividing the unpaid balance of purchase money by the total number of lots. Henderson sold several lots and parts of lots and made payments at the rate agreed upon to the plaintiffs, who conveyed the lots and parts of lots to the respective purchasers, and in some instances they did this without insisting upon payment of interest at the time in arrear. Henderson also made some payments on account of interest, in some instances being charged with and paying interest on interest.

Henderson became financially embarrassed, and as a result of negotiations, the nature of which it is not necessary to state in detail, an extension of time for payment

Statement. of arrears of interest was given to him. On the 26th of May, 1892, several payments of interest being in arrear, the plaintiffs wrote to the defendant informing him of this fact, and "inviting his attention to the matter." This was their first communication to him after he transferred his interest to Henderson.

After this a good deal of correspondence took place between the parties, and finally on the 20th of March, 1893, the plaintiffs commenced this action, claiming payment of \$1,929.72, being interest on the unpaid balance of purchase money from the 20th of March, 1891, to that date.

The defendant contended that the plaintiffs had accepted Henderson as their debtor in his place, and that if not, he had at all events become, as far as the plaintiffs were concerned, a surety merely, and had been released by the giving of time, the alteration in the terms of payment of interest, the sales of portions of lots, and the acceptance of purchase money according to value and not according to number. He brought in Henderson as a third party, and the action was tried at Toronto on the 2nd of February, 1894, before ROBERTSON, J., who on the 9th of March, 1894, dismissed it with costs, holding that there had been no novation, but that the defendant had become a surety and had been released.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 3rd, 4th and 5th of October, 1894.

J. K. Kerr, Q. C., and *W. Davidson*, for the appellants. This is not a case of principal and surety at all. Wilson is liable to the plaintiffs under his agreement and has never been released: *Swire v. Redman*, 1 Q. B. D. 536; *Birkett v. McGuire*, 7 A. R. 53. But even if the defendant became a surety, he has not been discharged by any of the acts complained of. The mode of computing the purchase money was the fairest in the interests of all parties, and at worst, if the purchase money accepted should have been

Argument

arrived at not by proportion of value but by proportion of number, that is a mere matter of account, and the error does not work a discharge. The same answer applies to the objection as to conveying parts of lots. That also is mere matter of account and there is nothing to prevent the plaintiffs from conveying part of a lot, retaining themselves the other part, and charging themselves with the proportion of purchase money applicable to the whole lot. *Holme v. Brunskill*, 3 Q. B. D. 495, relied on below in support of this objection is distinguishable. There was not in that case any power to surrender or vary. The express provision here for releasing lots makes all the difference: *Davis v. White*, 16 Gr. 312. The extension of time would work a release at most only as to the amount of interest then in arrear: *Croydon Gas Co. v. Dickinson*, 2 C. P. D. 46; *Ducker v. Rapp*, 67 N. Y. 464; *Dowden v. Levis*, 14 L. R. Ir. 307.

C. Robinson, Q.C., and *N. W. Rowell*, for the respondent. Apart altogether from any question of novation or suretyship there has been such a breach by the plaintiffs of the terms of the agreement that they cannot now call upon the defendant to carry it out. It is not, perhaps, clear whether the purchase money should have been based upon value or upon number, though the latter would appear to be the correct mode of arriving at the amount, and it is not very material which view is adopted, for, either way, the difficulty remains that parts of lots have been sold, and that is something the contract did not authorize. The moment the contract was thus broken Wilson could no longer be called on to carry it out on his side, and compensation, though a plausible, is a fallacious answer. It might have been sufficient to give credit as for full lots when the sales were made, but it is too late now. Apart from this, however, the defendant is entitled to succeed. The course of dealing shews most clearly that the plaintiffs looked upon Henderson as their debtor, and they cannot now hold Wilson as well. It is not necessary that there should be any express release: *Hart v. Alexander*, 7 C. & P. 746; *Henderson v. Killey*, 17 A. R. 456; 18 S. C. R. 698; *Rouse*

Argument. *v. Bradford Banking Co.*, [1894] 2 Ch. 32. If there was no novation the defendant became at least a surety merely : *Mathers v. Helliwell*, 10 Gr. 172; *Blackley v. Kenney*, (No. 2) 29 C. L. J. 108 ; *Oakeley v. Pasheller*, 4 Cl. & F. 207, and has been discharged. *Swire v. Redman*, 1 Q. B. D. 536, is of doubtful authority now, and the tendency certainly is to hold that knowledge by the creditor of the relationship that has sprung into existence between his debtor and some third person is sufficient to make applicable to him the doctrines governing questions of suretyship. Actual assent to, or direct recognition of, the new relationship is not necessary. If the defendant is in the position of surety he has been discharged. Time has been given to the principal debtor without his assent, and the effect of this cannot be limited to the instalment overdue. *Croydon Gas Co. v. Dickinson*, 2 C. P. D. 46, is quite a different case. There each instalment stood on an entirely distinct basis, and there was, in effect, as to each a separate agreement. In the present case there is one entire contract, and the surety has been discharged *quid* the whole : *Eyre v. Bartrop*, 3 Madd. 221.

N. Ferrar Davidson, for Henderson.

J. K. Kerr, Q. C., in reply.

January 15th, 1895. OSLER, J. A. :—

The questions raised on this appeal on which the liability of the defendant turns are substantially these: (1) Whether there was a novation or substitution of the contract between the plaintiffs and the defendant, so that the former must be held to have accepted the latter's assignee, Henderson, as their vendee, and to have given up all claim upon the defendant in respect of his personal covenants in the contract ; and (2) whether, if there was no novation or substitution, the plaintiffs have nevertheless, as held by the learned trial Judge, so dealt with the property and with the defendant's assignee as to discharge him from his liability under the contract to pay the purchase money and interest as therein provided.

As regards the first question, whether there was a novation, I agree with the learned Judge, that there was none. The action is upon the defendant's covenant to pay the purchase money and interest, and if a novation is to be established, it must be in the same way and upon the same principle as in the case of any other contract. The defendant had the right to assign his contract of purchase, and the plaintiffs, with knowledge of the rights of his assignee, were justified in dealing with the latter just as their contract would have justified them in dealing with himself, accepting payments on account of the purchase money and interest, and releasing parcels of the lands sold to sub-purchasers. But Henderson never entered into any personal contract with the plaintiffs to pay the purchase money, and beyond the right to make him a party to an action for specific performance of the agreement, they had no remedy against him. I cannot see that any or all of the facts found by the trial Judge, so far as this branch of the case is concerned, constitute a defence to the action. It is either novation or nothing, for there is no release, nor anything equivalent to it, and Henderson has not, by any arrangement which discharged the defendant from his covenant, been substituted for him as purchaser with the purchaser's personal liability to the plaintiffs to pay the purchase money in accordance with the terms of the agreement. I refer to *Scarf v. Jardine*, 7 App. Cas. 345, 361, 362. The plaintiffs, in short, have never lost their right to require the defendant to complete in accordance with the terms of the original agreement, varied, no doubt, so far as regards the rights which Henderson acquired under the assignment. Neither *Hall v. Laver*, 3 Y. & C. Ex. 191, nor *Holden v. Hayn*, 1 Mer. 47, decide anything to the contrary of this. I refer also to *Dyer v. Pulteney*, Barnardiston 160; *Wood v. Griffith*, 1 Swanst. at p. 56; *Chadwick v. Maden*, 9 Hare 188; Fry on Specific Performance, 2nd ed., secs. 151, 216, 1018, and the language of Lord Cairns, in *Shaw v. Foster*, L. R. 5 H. L., at pp. 338, 339. Speaking of the right of the

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vendee, he says: "There cannot be any doubt of the rights of Mr. Pooley (the vendee) with regard to the property of which he had thus become the beneficial owner. He had a right to devise it; he had a right to alienate it; he had a right to charge it. * * A simpler way in which he might have affected his interest would have been to contract with any one to whom he was indebted to assign to him the contract which he had entered into in whole, making the person to whom he was indebted assignee of the contract. Any one of those modes might, in my opinion, have been resorted to; and the only qualifications to which all or any of them would have been subject are these: first, that by none of these modes could anything have been done by Mr. Pooley derogating from, or impeding, or delaying the rights of the vendor to require the fulfilment of his contract, according to the terms; and secondly, whatever course was taken by Mr. Pooley and any person with whom he contracted to charge his interest, notice of the particulars of that charge, and the mode and form of the charge, would be required to be given to the vendor, in order that the vendor might shape his course according to the notice he had thus received."

Next, as regards the second question. It has been held in the Court below that the plaintiffs (1) by entering into an agreement with Henderson to give time for payment of some of the overdue instalments of interest, and (2) by dealing with the property in a manner different from that provided by the agreement in reference to the conveyance of lots sold to sub-purchasers, have discharged the defendant from all further liability.

As to the first. Apart from the shadowy and indefinite character of the agreement, it was at most merely an agreement with Henderson, in consideration of his paying one of the overdue instalments of interest—which as between himself and Wilson he was bound to pay—that the plaintiffs would refrain from suing Wilson. They were demanding payment from Henderson, but against him they had no remedy, and both of them knew that the consequence

of nonpayment would be that the plaintiffs would have to resort to Wilson upon his covenant. This was what Henderson desired to avoid, and so far as time was given to any one it was given to Wilson, and not to Henderson. I do not see that by reason of this agreement Wilson was prejudiced or delayed for a moment in respect of any remedy which he had against his own vendee, and therefore, assuming that he or the land stands towards the plaintiffs in the position of surety, and Henderson in that of principal debtor, time has been given not to the latter, but to the former, who is therefore not discharged : *Frazer v. Jordan*, 8 E. & B. 303 ; *Dunn v. Slee*, Holt N. P. C. 399.

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Giving, however, to the agreement the meaning the defendant contends for, I cannot think it would have any effect beyond discharging the defendant from the particular instalments then due. The contract as a whole was not affected, the time for payment of the principal not having arrived : *Croydon Gas Co. v. Dickinson*, 2 C. P. D. 46.

Then as to the plaintiffs' dealings with the land. They were bound to respect the terms of the contract, and to do nothing by which the rights of the defendant to have the land stand as a security for the purchase money, under the terms of the contract, would be affected. The contract is not very carefully framed. [The learned Judge read it, and continued :]

The expression "said lots" is no doubt to be referred to the lots as described on the plan spoken of in the agreement as intended to be filed in the office of the Master of Titles. The last clause of the agreement is obscure, and it is the dealings of the plaintiffs with Henderson under it which the defendant relies upon as discharging or releasing him from the contract. The land was bought for the purpose of speculation, and in a rising market, and was intended to be sold off in lots to be conveyed free from the plaintiffs' lien under the mortgage or agreement, but they would be careful to provide that their security for the large amount of their purchase money outstanding should not be thereby unduly diminished. The release clause, in my opinion,

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means that if the vendee makes any sub-sales of the lots on the plan the plaintiffs will recognize such sales and convey the lots free from their claim on payment of the proportion of the "purchase price" applicable on each. The "purchase price" means the balance of their own purchase money after deducting the first cash payment, and the proportion payable in order to entitle the vendee to a release is the aliquot part of the purchase money, ascertained by dividing the above balance by the number of lots in the plan. This assumed, and it was a reasonable assumption as the market then stood, that each lot would be sold for a sum not less than such proportion. Henderson subsequently sold some of the lots and the plaintiffs released them, and he also sold parts of some of them, as, for example, one lot and four feet more or less of the frontage of another; and they also released some of them without requiring payment of the interest in arrear. In both these respects, viz.: releasing part of a lot and releasing a lot without insisting upon payment of arrears of interest, I think the plaintiffs were doing what was not authorized by the agreement or were affecting the defendant's security for the arrears. The agreement authorizes only the release of the whole of any lot as specified upon the plan, and for a defined proportion of the balance of the original price, not the sub-dividing of a lot, leaving irregular or broken parts which may never in that shape realize the amount which a full lot would bring and in other ways probably affecting its selling price; while the effect of leaving the interest to accumulate and discharging at the same time a lot or lots of land for the aliquot proportion of the principal was to directly diminish the security which the defendant was entitled to look to for payment of the whole purchase money.

But it appears to me that the effect of these acts of the plaintiffs is not to discharge the defendant, regarded as a surety, altogether from his liability under his contract. It is the case simply of a partial discharge to the extent to which it may be found that the surety has suffered loss.

In *Polak v. Everett*, 1 Q. B. D. 669, at p. 675, the law is thus laid down by Blackburn, J.: "Where a person is a creditor with a pledge or surety he is in equity bound to account not only for the moneys he has actually made out of the pledge, but also for the moneys he might, ought, or should have made out of the pledge, and he must allow for that whether he made them or not, and if by laches he has diminished the value of the pledge he is bound to allow for the sum he ought to have made. But his laches does not discharge the surety, for it does not come within the principle which applies where the surety's rights have been changed or varied." See also *Wulff v. Jay*, L. R. 7 Q. B. 756; *Rainbow v. Juggins*, 5 Q. B. D. 138; *Pearl v. Deacon*, 24 Beav. 186; 1 DeG. & J. 461.

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And the observations of Lord Watson in *Taylor v. Bank of New South Wales*, 11 App. Cas. 596, 602, are in point. There it was contended by the sureties for payment of a mortgage debt that they were discharged from liability on the ground that the mortgagees had, without notice to them, sold parts of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and thus that they had been deprived of the benefit of a security upon which they were entitled to rely for protection. It was held that the sale had in fact been effected by the mortgagor, though with the consent of the mortgagees, in the due course of his management and in a manner contemplated by the deed; but it was said by Lord Watson, speaking for the Board: "Even if it had been shewn that the benefit of the price of these 2,500 sheep was lost to the sureties through the act of the bank, the appellants could not have been thereby discharged from all liability. In that event the present case would not have been within the principle of *Polak v. Everett*, 1 Q. B. D. 669, and *Holme v. Brunskill*, 3 Q. B. D. 495." In both these cases there had been an alteration of the original contract between the creditor and the principal debtor without the consent of the mortgagee, who was held to be wholly discharged on the plain ground that he could not be made liable for the

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default of a contract which he had not guaranteed. The case would in such event have been within the rule in *Pearl v. Deacon*, 24 Beav. 186; 1 DeG. & J. 461, where the creditor had by his own act rendered unavailable part of the security to the benefit of which the surety was entitled, and the latter was held to be discharged, not absolutely but only *pro tanto*.

In *Holme v. Brunskill*, 3 Q. B. D. 495, which the learned Judge below relied upon, there was a clear variation by a new agreement between the landlord and tenant of the terms of the original agreement between them for the performance of which the defendant as surety had become responsible, that variation consisting in the surrender of a portion of the demised premises and a reduction of the rent as originally reserved.

In the case at bar I think the defendant is entitled to say that he is discharged (1) to the extent of any interest in arrear when the lots released from the agreement were respectively conveyed; and (2) that as regards lots of which small portions only were conveyed, the full amount of the proportion of the "purchase price" should be taken into account and allowed to him as against any claim under the agreement. It may be that so far as the present action is concerned this will entitle him to succeed, and unless the parties agree, as they probably can readily do, there must be a reference to the proper officer to take the accounts between them and report the result. The appeal must, therefore, on this ground, be allowed.

MACLENNAN, J.A.:—

I also am of opinion that there was no agreement of novation. The purchaser having assigned his contract, the moment the vendors were notified of that, they had no option but to recognize it, and to deal with the purchaser as the person entitled to have the contract performed. This relation which Wilson himself created between

the plaintiffs and Henderson sufficiently explains and accounts for all that took place between them and Henderson, and I think removes all ground for mere inference of a contract of novation. Neither, in my opinion, can the defendant claim to be discharged by reason of giving time to Henderson. In the first place I do not think it is made out that any definite extension of time was agreed to, but if it were, it was for an extension not to Henderson but to Wilson himself, which was of no force as between the plaintiffs and him ; and moreover, if Wilson could be regarded as a surety his remedies against Henderson were in no way impaired or interfered with.

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MAOLENNAN,
J.A.

The remaining question is as to the effect of the plaintiffs having released portions of lots at the request of Henderson without the consent of the defendant. No doubt Henderson had the same rights under the contract as the defendant, his assignor, and he could require the company to release lots on payment of a due proportion of the purchase price. There were two copies of the agreement executed by both the plaintiffs and the defendant. They were alike in all respects except the clause providing for the discharge of lots. In the one copy it reads : "Company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The last three words are omitted from the other copy. These words make the meaning of the parties a little clearer, and I think the meaning is that the purchaser could at any time, and from time to time, pay up a proportion of the purchase money, and claim an immediate conveyance of any one or more of the lots of which the land sold was composed. The contract was evidently intended to enable the purchaser to deal with the land by sub-sales with as much freedom as possible, and immediately before the clause in question is another with the same object, namely, that the purchaser might make prepayments at will. He could, therefore, pay the whole purchase money at any time, and claim a conveyance of the whole of the land, or he could pay for any one or more of the lots at

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any time, and from time to time, by paying a due proportion of the purchase money, and obtain a conveyance of such one or more of the lots. Giving the widest scope to this clause of the agreement in furtherance of the general intent of the parties, I cannot think it gives the right to claim a release of anything less than a full lot as described in the plan, and I think the plaintiffs could not do that without Wilson's consent.

It is admitted that this was done in several instances, and the question is how it affected the rights of the defendant. I am clearly of opinion that the only effect is that, as between the plaintiffs and Wilson, they must give him credit for the value of the whole lot in each such case. They could not release the whole or any part of a lot but upon payment of a proportion for the whole lot; but upon such payment they could release either the whole, or any part. Therefore, I think that the defendant remains liable for purchase money on his covenant for payment, but is entitled to credit for the proportionate value of every lot of which the whole or any part has been conveyed or released.

The further question remains, as to how this proportion is to be ascertained. What is "the purchase price" applicable on each lot? Does it mean the original \$23,000, or the balance after the down payment, viz., \$20,500; or does it mean the balance which might remain from time to time after any subsequent payments made generally on account, as, for example, the balance after the second payment of \$2,500, which, I understand, was made generally. I was for some time of opinion that it means the last of these three alternatives, and there is, I think, much to be said in favour of that view. Upon the whole, however, I think it means the balance after the down payment, this being the opinion of my learned brothers, and that which best accords with the use of the words "purchase price," and gives the vendor a margin of safety for the ultimate payment of the whole of his purchase money, while at the same time giving the purchaser the freedom in making

sales which he was intended to have, without being obliged to pay the whole of his purchase money in advance. Therefore, I think that whenever the release of one or more lots was required the proportion which the purchaser must pay is a due proportion of \$20,500, and not of \$23,000.

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MACLENNAN,
J.A.

I also think that whenever the release of a lot was demanded, the purchaser would have to pay all interest in arrear on the whole remaining purchase money, as well as the due proportion of principal money, and also the interest accrued but not due on that proportion, and if the company has released any lot or part of lot without such payment, the defendant has thereby been discharged from the sum, whether of principal or interest, which the plaintiffs ought to have exacted, but did not exact.

We have not the means of taking the account, or of ascertaining what, if anything, is due to the plaintiffs as the result of this decision, and therefore, while we allow the appeal, there must be a reference to the Master to take the account, unless the parties can agree between themselves. If nothing should be found due, the action should be dismissed with costs, otherwise there should be judgment for the plaintiffs for whatever sum may be found due by the Master's report, with costs, on the appropriate scale, according to the result.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal allowed with costs.

CONFEDERATION LIFE ASSOCIATION V. CITY OF TORONTO.

Assessment and Taxes—Insurance Company—Reserve Fund—Interest—Income.

Interest earned on the statutory reserve fund of a life insurance company is part of its assessable income.

The decision of the Judge of a County Court on a question of assessment is final, when he is dealing with property that is assessable at all.

Judgment of FERGUSON, J., 24 O. R. 643, affirmed.

Statement.

THIS was an appeal by the plaintiffs from the judgment of FERGUSON, J., reported 24 O. R. 643, in an action to have declared illegal an assessment of the interest arising from the plaintiffs' statutory reserve fund.

The appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., and STREET, J., on the 29th of January, 1895.

S. H. Blake, Q. C., and *A. J. Russell-Snow*, for the appellants.

Fullerton, Q. C., and *T. Caswell*, for the respondents.

The facts are stated in the report of the case in the Court below, and the line of argument is there indicated. The following cases, in addition to those there cited, were referred to: *Peters v. City of St. John*, 21 S. C. R. 674; *Last v. London Assurance Corporation*, 10 App. Cas. 438; *Gresham Life Assurance Society v. Styles*, 25 Q. B. D. 351; *New York Life Insurance Co. v. Styles*, 14 App. Cas. 381; *Brantford v. Ontario Investment Co.*, 15 A. R. 605; *Watt v. City of London*, 19 A. R. 675; 22 S. C. R. 300.

March 5th, 1895. OSLER, J. A.:—

In my opinion the judgment of my learned brother Ferguson must be affirmed. It is for the plaintiffs to shew that the interest arising from the investment of their reserve fund is exempt from taxation as not being income within the meaning of the Assessment Act; in

other words, that it is one of the exemptions and comes within the class of exemptions specified in the Act.

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The plaintiffs are not legally bound to add the revenue arising from the fund to the fund itself. It is received by them as one of their general sources of income, and they are free to do with it as they please. As a matter of bookkeeping on the one hand, and of prudent business dealing on the other, they augment the fund by carrying the income arising from it to its credit, but they might apply any other fund or portion of their income to the same purpose without infringing anything but an internal business regulation of their own, or, at most, of the Government Superintendent of Insurance.

So far as this source of augmentation is diminished by assessment, they can or must implement it by drawing upon other portions of their income, the only effect of which is to reduce what would otherwise be at their command to appropriate in payment of dividends to their shareholders, bonus additions to policies, or other outgoings of that kind.

I think the matter was one within the jurisdiction of the County Court Judge under the statute, and that the action is not maintainable.

MACLENNAN, J. A. :—

The facts of the case are stated with great fullness and accuracy in the judgment, and there are just two questions, first, whether the decision of the learned County Judge is final, and secondly, whether if it be not final, it is right. If our judgment should be for the respondents on the first question it will not be necessary to express any opinion upon the other.

The jurisdiction of the assessor is not disputed. It is not denied that the appellants were liable to assessment for some amount in respect of personal property. They paid dividends to their shareholders to the amount of \$15,000. That was paid out of income, and they say that

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MACLENNAN,
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I am of opinion that the learned County Judge in fixing the amount of the assessment was acting within his jurisdiction, and that his decision is final. There was, therefore, no jurisdiction in this action to inquire whether the amount fixed by him was excessive, and it was rightly dismissed.

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MACDONALD,
J. A.

STREET, J. :—

From the evidence and admissions it appears that the plaintiffs were assessed by the defendants in the year 1892, for the year 1893, for the sum of \$150,000, alleged to be in respect of taxable income for the year: that the plaintiffs appealed to the Court of Revision who confirmed the assessment: that the plaintiffs then appealed to the County Judge who, after hearing argument on the appeal, increased the assessment to \$168,000.

The plaintiffs contended that except as to the sum of \$15,000, this assessment was upon property not liable to assessment and was illegal and void. They paid the tax levied in respect of the assessment under protest and after threat of distress and brought the present action to recover the sum of \$2,619.44, being the portion of the taxes paid upon the alleged illegal assessment.

The evidence of Mr. Macdonald, the plaintiffs' actuary, shewed that they kept, as they are bound to do under the Insurance Act, R. S. C. ch. 124, sec. 10, a reserve fund against their outstanding policies: that this reserve fund amounted at the time of the assessment complained of to \$3,226,467, and that it was to the assessment of the interest received in respect of the investments of this reserve fund upon mortgages, debentures, and other personal securities that they objected. Their contention was, that under the Insurance Act they were bound to keep their reserve fund intact to the full amount of the reinsurance value of their policies in force, and that the interest upon it could no more be assessed than the principal.

It was stated by counsel for the plaintiffs upon the

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STRENT, J.

It is obvious, however, that in any event the interest upon the reserve fund is simply a part of the general income of the company and must be taken into account along with the premiums received upon policies and the other details of income in the periodical profit and loss account, because the interest upon the reserve fund may in itself be more, or it may be less, than what is required to be added to the reserve fund to keep it up to the proper standard. If there be a surplus then it goes to swell the net income of the company: if there be a deficiency it must be made up from other parts of the income of the company, or failing them from calls upon the shareholders. Because it happens that perhaps the company may have been in the habit of carrying the interest upon the reserve fund directly to the credit of the reserve fund instead of passing it through a profit and loss account the character of the receipts is not changed: nor are they thereby taken out of the reach of the assessor if another form of book-keeping would have left them within it.

The company is taxable upon its income, which plainly, I think, means the balance remaining in each year of the receipts after paying expenses, providing for liabilities, and replacing capital lost or expended. There may be room for much argument as to what classes of charges are properly to be deducted from gross receipts, but no such question is raised here by the pleadings or the evidence: the plaintiffs' claim is that the interest upon the reserve fund

cannot in any event be assessed, and that in assessing it or taking it into account the assessor, the Court of Revision, and the County Judge, acted entirely without jurisdiction. In my opinion this contention is clearly wrong: the interest on the reserve fund stands in no different position from any other part of the income of the company: the whole question was within the jurisdiction of the County Judge as one of amount only, and his decision was final: *Marshall v. Pitman*, 9 Bing. 595; *Last v. London Assurance Corporation*, 10 App. Cas. 438, 446; *London Mutual Insurance Co. v. City of London*, 15 A. R. 629.

In my opinion the appeal should be dismissed with costs.

HAGARTY, C. J. O.:—

I am of the same opinion.

Appeal dismissed with costs.

MOORHOUSE V. HEWISH.

Sale of Land—Description—"More or Less"—Specific Performance.

Where a city building lot was described in an agreement for exchange as having a depth of "130 feet, more or less," and had in fact a depth of only 117 feet with a lane in rear twelve feet wide, specific performance at the suit of the owner was under the particular circumstances refused. Judgment of BOYD, C., affirmed.

Statement. THIS was an appeal by the plaintiff from the judgment of BOYD, C.

The action was brought for specific performance of an agreement by the defendant to take in exchange from the plaintiff "lot 108, Queen street east (Toronto), plan M 8, 24 x 130 feet, more or less, valued at \$75 a foot." The lot had, in fact, a depth of 117 feet with a right of way over a lane in rear 12 feet wide.

The action was tried at Toronto, on the 25th of April, 1894, before BOYD, C.

There was conflicting evidence as to value, some of the witnesses swearing that a lot 117 feet in depth with a lane 12 feet wide in rear was worth more than a lot 130 feet in depth without a lane, while the defendant and some of his witnesses took the other view. There was also much evidence as to the negotiations leading up to the agreement and as to the defendant's knowledge of the size of the lot, which it is unnecessary to set out.

The learned Chancellor held that it was not a case for the exercise of the discretionary jurisdiction of the Court in enforcing specific performance, and dismissed the action, but without costs, the defendant's agent being responsible to some extent for the error.

The plaintiff's appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 23rd of January, 1895.

Allan Cassels, for the appellant, contended on the *Argument*. question of description, that the words "more or less" covered a discrepancy of this extent, citing *Winch v. Winchester*, 1 V. & B. 375; *Cordingley v. Cheeseborough*, 4 D. F. & J. 379.

J. Douglas, for the respondent, cited *In re The Deptford Creek Bridge Co.*, 28 Sol. Jour. 327; *Portman v. Mill*, 2 Russ. 570.

March 5th, 1895. HAGARTY, C.J.O.:—

The facts bring the case within the doctrine laid down by Tindal, C.J., in *Flight v. Booth*, 1 Bing. N. C. 370, which is cited with approval in *In re The Deptford Creek Bridge Co.*, 28 Sol. Jour. 327 (1884), before Cotton, Fry, and Bowen, L.JJ.

In *Flight v. Booth*, 1 Bing. N. C. 370, the rule is thus stated (p. 377): "In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." This seems to have a most rational and refreshing sound amid the rather discordant notes of the law of vendor and purchaser.

I think the case before us was very rightly decided, and that it would have been strangely unfair if this defendant had been forced to take a city lot intended for building purposes 13 feet short out of a depth of 130 feet.

The argument as to the saving effect of "more or less" might have been pushed in a case like this with equal cogency to a deficiency of 30 feet.

I think that the appeal must be dismissed.

Judgment. **MACLENNAN, J.A. :—**

**MACLENNAN,
J.A.**

Upon the whole I think the judgment right, for the reasons expressed by the learned Chancellor. The parcel of land in question is a building lot, suitable, having regard to its situation, only for the building of stores. It is described in the contract as "lot 108, Queen street east, plan M 8, 24 × 130 feet, more or less, valued at \$75 per foot." It turns out that the depth is only about 117 feet. Upon discovering this deficiency the defendant at once objected to carry out the contract; and he swears that in entering into it he was influenced by the representation of the plaintiff contained therein, and that if he had known the true dimensions he would not have done so. That being so, and the learned trial Judge having found in favour of the *bona fides* of the defendant in raising the objection, I think the law requires us to relieve him from the contract, and to refuse to enforce specific performance. It is always discretionary with the Court, under all the circumstances, in actions for specific performance, how far to give effect to the qualifying words "more or less" in a matter of measurement; and in that respect I think we cannot interfere with the decision of the learned Chancellor.

I think that the appeal should be dismissed.

BURTON, and OSLER, JJ.A., concurred.

Appeal dismissed with costs.

HOOFSTETTER V. ROOKER.

*Mortgage—Charge—Executory Agreement—Registry Act—Witness—
R. S. O. ch. 114, secs. 44, 45 and 80.*

A letter in the following form : "I agree to charge the east half of lot number nineteen * * with the payment of the two mortgages * * amounting to \$750 * * and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said mortgages," is not a mere executory agreement, but operates as a present charge in favour of the mortgagees named upon the lands described and may be registered against them.

Per MACLENNAN, J.A.—An affidavit of execution for the purpose of registration may be made by a person who in fact witnesses the signature, but who writes his name, not as witness but as the person to whom such a letter is addressed.

Per OSLER, and MACLENNAN, JJ.A.—Where an instrument is in fact registered, section 80 of the Registry Act cures any irregularity in the proof for registration.

Judgment of the Chancery Division reversed.

THIS was an appeal by the plaintiff from the judgment Statement.
of the Chancery Division.

In the year 1886, William Henry Christopher, being the owner of the north-west quarter of lot sixteen in the first concession of the township of Loughborough (now Storrington), mortgaged it to the plaintiff to secure \$350, and he also mortgaged it to the Reverend G. M. Grant to secure \$400. As collateral security for the repayment of these sums, the defendant Hughson gave to each mortgagee his personal bond. In April, 1888, Christopher conveyed his equity of redemption in the lot to Hughson. In March, 1893, both mortgages were overdue, and Hughson was being pressed for payment, and on the 14th of March, 1893, signed the following document,—he being then the owner of the land mentioned in it:—

"Dear Sir,—I agree to charge the east half of lot number nineteen (19) in the seventh (7) concession of Loughborough with the payment of the two mortgages held by G. M. Grant and Mrs. Hoofstetter respectively upon the Christopher farm, being the north-west quarter of lot sixteen in the first concession of Storrington, amounting to \$750 and some arrears of interest, and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said Christopher mortgages.

G. M. Macdonnell.

J. H. Hughson."

Statement.

This was written by Mr. G. M. Macdonnell, solicitor for both mortgagees, in his office at Kingston, on the firm's office paper, their name and address being printed thereon, and the words "Dear Sir" being also printed, and was signed by Hughson in his presence. The name "G. M. Macdonnell" was written beneath the letter at the left hand side, and following it was either a flourish or a contraction for "Esq.," it being impossible to tell from the document itself which was intended. Hughson having become financially embarrassed, Mr. Macdonnell on the 3rd of July, 1893, made the usual affidavit of execution and registered the document in the proper office. On the 15th of July, 1893, Hughson conveyed the east half of lot 19 to the defendant Johnson, who gave a mortgage on the same day to the defendant Rooker.

This action was brought to enforce the Christopher mortgage, and the Hughson charge, and was tried at Kingston on the 1st of December, 1893, before BOYD, C., who, on the 4th of December, 1893, gave judgment in the plaintiff's favour.

This judgment was reversed by the Chancery Division, and the plaintiff appealed, the appeal being argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 23rd of January, 1895.

Langton, Q. C., for the appellant. The document in question is an executed agreement in writing, and upon its being signed it created an equitable charge upon the lands mentioned in it: *Russel v. Russel*, 1 Bro. C. C. 269; *Craddock v. Scottish Provident Institution*, 69 L. T.N.S. 380. The objections mainly relied upon to invalidate the agreement are that both parties to the agreement are not shewn, and that no consideration appears; but the first objection is clearly untenable, for the plain reading of the document is that it was made in favour of the mortgagees. Nor can the second objection prevail. Consideration does appear in the document. The existence of the mortgage debts

is mentioned and also the fact that they were in arrear. Argument.
 Forbearance to sue is implied, and time was, in fact, given: *Leask v. Scott*, 2 Q. B. D. 376; *Alliance Bank v. Broom*, 2 Dr. & Sm. 289; *Crears v. Hunter*, 19 Q. B. D. 341; *Hamlyn v. Wood*, [1891] 2 Q. B. 488; *Davies v. Funston*, 45 U. C. R. 369; *Shadwell v. Shadwell*, 9 C. B. N. S. 159. The consideration may be implied from the surrounding circumstances: *Greenham v. Watt*, 25 U. C. R. 369; *Joint v. Mostyn*, 2 Fox & Smith 4. The registration of the instrument was complete and perfectly regular. The Registry Act nowhere forbids the agent of a party to an instrument to be a witness to it, and there is nothing to prevent the witness from adopting as his signature as witness his name already written by himself at the foot of a letter as the person to whom the letter is addressed. The proof for registration is required in order to satisfy the registrar of the authenticity of the instrument. If it does so its purpose is answered, and his judgment upon it cannot be reviewed, and when an instrument capable of registration is registered by him it is registered for all the purposes of the Act. There is no such thing as defective registration: *Laurie v. Rathbun*, 38 U. C. R. 255; *In re Clarke and Chamberlain*, 18 O. R. 270; *Read v. Whitehead*, 10 Gr. 446; R. S. O. ch. 114, secs. 76 to 83.

Cassels, Q.C., for the respondents: This is an executory agreement, and the consideration must be shewn. Here it is not, and this is fatal: *Wain v. Warlters*, 5 East 10; *Ruikes v. Todd*, 8 A. & E. 846; *Price v. Richardson*, 15 M. & W. 539; *Sykes v. Dixon*, 9 A. & E. 693. There was in fact no consideration. Forbearance is not a consideration unless for a definite time, and the consideration cannot be shewn by oral testimony, nor can it be implied from the surrounding circumstances: *Crofts v. Beale*, 11 C. B. 172; *Ryan v. McKerral*, 15 O. R. 460. The agreement is defective also because the party with whom Hughson is alleged to contract is not disclosed: *Potter v. Duffield*, L. R. 18. Eq. 4; *Thomas v. Brown*, 1 Q. B. D. 720; *Bland v. Eaton*, 6 A. R. 73. Macdonnell could not be a party

Argument. and a witness. He himself says that his signature was placed as a witness. There was, therefore, no party with whom it was made. If Macdonnell was a party, the registration was invalid: R. S. O. ch. 114, secs. 40, 44.

Langton, Q.C., in reply.

March 5th, 1895. HAGARTY, C. J. O.:—

I do not see any objection that can be successfully urged against the registration. There was a sufficient affidavit of a witness swearing he was a subscribing witness and I cannot see that we can enter into any discussion as to the character in which his name appears, whether actually as witness or as the person to whom the letter is addressed.

I think, according to all rules of construction, it sufficiently appears therein that the proposed security is to be given to Mr. G. M. Grant and to Mrs. Hoofstetter, the present plaintiff.

Then it was insisted that the alleged contract was wholly executory, providing for things to be thereafter done.

I agree with Mr. Langton's argument that the document amounts to a present charge, to be completed when required by the execution of "proper mortgages."

I think it falls within the principle of such cases as *Bonnewell v. Jenkins*, 8 Ch. D. 70. Fry, J., says (p. 72): "A long series of cases has established this proposition, that the mere reference to a future contract is not enough to negative the existence of a present one. * * I come to the conclusion that (this) is a simple acceptance of the offer made by the plaintiff, accompanied by a mere statement of an intention that that arrangement shall be reduced into a formal contract."

James, L.J., says (p. 73): "There are indeed cases such as *Rossiter v. Miller*, 5 Ch. D. 648, where the Court may hold that the reference to the future contract is such as to shew that the parties did not intend to be bound until it was signed, but such cases depend on their own special circumstances."

Thesiger, L.J. (p. 74): "The mere reference to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape does not prevent the existence of a binding contract."

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C.J.O.

See also *Hussey v. Horne-Payne*, 8 Ch. D. 670, 4 App. Cas. 311.

"I agree to charge," must be read as "I hereby charge."

I am unable to agree with the Court appealed from that this is an executory agreement.

The remaining objection, and the most serious, that there is no sufficient consideration shewn, was not taken at the trial, but was held to be fatal in the Divisional Court.

The cases relied on below are following the leading case, *Wain v. Warlters*, 5 East 10, and undoubtedly shew that where a person charged as a guarantor, or as some one undertaking as to the debt of another, or default of another, the writing required by the statute must shew a consideration moving to the defendant.

Powers v. Fowler, 4 E. & B. 511, cited below, was a case where the solicitor for a vendor of real estate, (the latter not being able to complete his purchase) wrote to the effect that he would be responsible for his so doing. He was held liable, as the inference was that the giving of time or forbearance for two months was the consideration. The case went to Error, and finally went off on leave to amend.

We have here to deal with the case of an agreement made by a debtor, not with a third person, but with his creditor, the plaintiff, and amounting to the creation of a charge as additional and further security on other property. It seems in substance thus: "I owe plaintiff so much money. I hereby charge lot — with the payment of the same and will execute a mortgage on demand therefor." The consideration seems to appear in the contract, viz, plaintiff's mortgage on the other land. If forbearance were stipulated for, there would also be full consideration.

The case of *Card v. Jaffray*, 2 Sch. & Lef. 374, before Lord Chancellor Redesdale, is very instructive as to the

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extent to which the Court will go to give effect to a contract to give a mortgage to a creditor to secure his debt. It distinguishes such an agreement from a contract of sale between vendor and purchaser. He says (p. 384): "In a purchase the precise terms of the contract are essential to the validity of the contract itself, and therefore it would be impossible, upon such a direction as this, to say that the party should be at liberty to enter into parol evidence of the terms of the agreement." He says that the question before him was whether that had been done which entitled the plaintiff to say that a contract for a mortgage valid within the Statute of Frauds had been made. There was no written agreement to that effect. The plaintiff relied on certain acts done, especially on the debtor writing on the back of a draft conveyance to be made to him by third persons of certain property in which he was interested: "Be so good as to make the conveyance in the name of N. C." (the plaintiff). He points out, at p. 383, that when the question is as to a mortgage for a pre-existing debt, the mischief contemplated by the statute will not arise.

He refers at length to Sir Simeon Stewart's case, where a letter was written from a debtor to a creditor stating that he would make a mortgage to him on some part of his Hampshire estates, and this letter was held after the debtor's death and alienation of his estates, to be sufficient to take the case out of the statute.

Sir Simeon Stewart's case is also stated, not so fully, in *Burn v. Burn*, 3 Ves. 573. The Lord Chancellor there speaks of the letter in Sir Simeon Stewart's case as an incomplete agreement for a mortgage which the Court had enforced as a specific lien. The case is cited in Fisher's *Law of Mortgage*, 4th ed., p. 50.

It was urged that the agreement here provided for no forbearance. If this were necessary some remarks of Kindsley, Vice-Chancellor, would be in point, though referring to security on chattels: *Alliance Bank v. Broom*, 2 Dr. & Sm., 289. The plaintiffs (bankers) pressed the defendants for security for their debt, and the defendants wrote that

they handed the following particulars of produce, of which list was attached, "which we propose to hypothecate against our loan account, and at the same time undertake to pay the proceeds as we receive them to the credit of the said account." Two days after the plaintiffs applied to the defendants for the warrants for delivery of the goods. The defendants promised to deliver but failed to do so, and threatened to deliver to others. On a bill filed to declare the plaintiffs' lien and for an order for delivery, the defendants demurred on ground that the letter was without consideration. The Vice-Chancellor held that although there was no promise to give time the effect was that they did in fact give time, and that the defendants received the benefit of some degree of forbearance, not indeed for any definite time, but, at all events, some extent of forbearance, and that the circumstances necessarily involved the benefit to the debtors of a certain amount of forbearance which they would not have derived if they had not made the agreement.

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In *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266, Bowen, L.J., quotes the language of the Vice-Chancellor in the last case with approval, and reviews some of the authorities. He dissented from the conclusions arrived at by the majority of the Court, but there is nothing in their judgments against the principle as to giving time in the case of a real debt.

Crears v. Hunter, 19 Q. B. D. 341, is much to the same effect. Forbearance was actually given and implied to have been the consideration.

In the case before us there was actual forbearance of about four months from the signing of the charge.

I think that the appeal should be allowed, and the judgment of the learned Chancellor restored.

OSLER, J. A. :—

The judgment of the learned Chancellor should, in my opinion, be restored. With a trifling reservation as to the form of the instrument, I concur in his reasoning and the

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result he arrived at. The point on which I venture to differ from him is this: I think Mr. Macdonnell's name was written and subscribed as witness to the execution of the instrument and not as the name of a person to whom it was addressed. When the original is examined it appears to be written on an ordinary sheet of letter paper of the firm of Macdonnell & Mudie, on which is printed in small type, some distance from the commencement of the writing, the usual opening words of a letter, viz., "Dear Sir." With all deference, I do not regard these words as being any part of the instrument. It is not necessary to so regard them, because the names of the parties to whom or for whose benefit it was given appear therein, nor do I think it was ever intended that the instrument should take the form of a writing addressed to any one. The contrary view depends on the assumption that Mr. Macdonnell is the person addressed, "G. M. Macdonnell, 'Esq.'" To me, I must say, it seems plain that what has been read as "Esq." is a mere scroll or flourish separating the name of the witness from that of the signatory. Mr. Macdonnell's evidence at the trial is not opposed to this. He was unable to say from recollection how the fact was apart from the paper he was looking at, and in that state of things I prefer to take what his recollection or impression was months before, when he made the affidavit on which he procured the deed to be registered, in which he stated that he was the subscribing witness. I should find as a fact that he was the subscribing witness and not a party to the document or a person to whom it was addressed, and, therefore, that the registration was free from any defect or irregularity.

My brother Meredith in the Divisional Court rested his judgment overruling the Chancellor entirely on the ground that the registration was a nullity, because Macdonnell, being a party, could not make the affidavit of execution as a subscribing witness. If that were the case, the registrar might, and ought to, have refused to register the document, but, having registered it in fact, I do not wish to be

understood as assenting to the view that the curative sections of the Registry Act would not apply, assuming that the document itself was a valid effective instrument *inter partes*.

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This brings me to consider the grounds on which the other two learned Judges in the Divisional Court reversed the judgment at the trial, Ferguson, J., holding that the instrument was not a sufficient memorandum of agreement within the 4th section of the Statute of Frauds (the only section referred to) the consideration not being disclosed therein; and Robertson, J., that it was a mere executory agreement and not a present charge, and, therefore, that the consideration ought to have appeared therein, and as it did not, it was insufficient. None of the grounds on which the judgment below proceeded were raised at the trial. I have already disposed of the objection to the registration, and I am unable, with all respect, to agree with my brother Robertson's view that the language of the document is not sufficient to create a present equitable charge. The lands intended to be charged being specified, there is no substantial difference between the words, "I agree to charge," and "I hereby charge": see *Falkner v. O'Brien*, 2 Ba. & Be. 214; *Freemoult v. Dedire*, 1 P. Wms. 429. Nor do the subsequent words of the document by which the maker agrees "on demand to execute proper mortgages of the said lands to carry out this agreement or to pay off the Christopher mortgages," necessarily import that anything was executory beyond what those words by themselves call for, namely the execution of the mortgages on demand. The equitable charge is created by the earlier expression, and might be enforced without requiring the execution of the mortgages, there being nothing to shew that the charge was intended to be created by that means only, *i.e.*, that the instrument was to go for nothing unless followed up by a formal mortgage.

Bearing in mind that this was an instrument given by a debtor to his creditor, and that proof of its acceptance by the latter is clear, *i.e.*, that it is not a mere proposal to

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give security, the authorities shew that it is an instrument in writing sufficient to constitute an equitable mortgage or charge upon the property which the debtor professes to charge thereby.

"Effect will be given to an intention to create a security notwithstanding any mistake in the manner of making it:"

1 Coote's Law of Mortgages, 5th ed., p. 212.

"An equitable mortgage may be made * * by an agreement to create a security in consideration of a debt due or of an advance actually made:" Fisher's Law of Mortgage, 4th ed., p. 50.

In *Card v. Jaffray*, 2 Sch. & Lef. 374, Lord Redesdale states the case of *Stewart v. Tichborne*, cited also in *Burn v. Burn*, 3 Ves. 573. In that case Sir Simeon Stewart being embarrassed in his affairs made a conveyance in trust for the payment of his debts. Previously to doing so, he had prevailed upon a Mr. Willis to lend him a large sum of money; and he wrote him a letter, in which he stated that he would make him a mortgage on some part of his Hampshire estates. The question was whether this bound the estate in the hands of the trustees as being an equity affecting him prior to the conveyance. The Court held that the letter was sufficient to bind him, and bound the estate in the hands of the trustees, who had taken with notice. "An objection was made that no particular part of the estate was ascertained; the answer was, that a part of the estate sufficient for the purpose might be implied. Another objection was that it did not appear from the letter what was the debt; that the letter was only a promise to make a mortgage; it was answered that the debt was ascertained *aliunde*, viz., by the documents proving the debt."

Further commenting upon this case and distinguishing cases of purchases where the property was to be sold out and out, Lord Redesdale adds: "The price to be paid (in such cases) was an essential part of the contract; and if that was not clearly ascertained by writing, the mischief intended to be remedied by the statute might occur in such

a case, as much as if there was no writing at all. But when the question is as to a mortgage for a pre-existing debt, I conceive that mischief cannot arise: and therefore there is no difficulty in saying that the letter in *Stewart v. Tichborne* was sufficient for the purpose of taking the case out of the statute."

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In the recent case of *In re Beetham; Ex parte Broderick*, 18 Q. B. D. 380, 766; 35 W.R. 613, the question was whether a banking company had obtained a valid equitable mortgage as against the trustee in bankruptcy upon their debtor's interest or share in a farm, by an instrument in the following terms (so far as important to be stated) addressed to the directors of the bank: "Referring to the subject of your conversation last Thursday, I shall be happy to give you at any time, whenever required, security over my share of the farm, in any shape or way you may deem best."

In the Divisional Court it was held that this letter did not amount to a valid equitable mortgage. On appeal the respondents' counsel were heard only upon the question whether the company had accepted the offer made by the letter. Lord Esher said (p. 768): "The letter seems to me to constitute only an offer by the bankrupt, and not to be a contract. The bank were not bound to accept the offer, and, in order to constitute a contract, it was necessary that there should be an acceptance by them but, if the offer had been accepted by them, I am strongly inclined to think there would have been a contract for an equitable mortgage, and that the letter, though written before the contract was complete, would have been a sufficient memorandum in writing of the contract within the Statute of Frauds. The question, therefore, is whether those who set up the equitable mortgage have made out an acceptance of the offer by the bank?" Then after referring to the facts and commenting upon the evidence, he came to the conclusion that the directors had never accepted the letter, and indeed he thought, had never seen it. What they had accepted and relied upon was a former oral promise of the bankrupt to give security, and the let-

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But the terms of that letter are so close to those of the instrument we have to deal with that there is no difficulty in regarding the judgment as an authority in support of the plaintiff's contention that it is a writing sufficient to constitute a valid, equitable mortgage or charge for the debt secured by the mortgages therein referred to. All that was necessary was that the charge should be proved and manifested by a writing, so that there might be evidence in writing of what it was, as regards the debt charged and the land intended to be charged. The writing which we have here fulfils these requirements, and I am therefore of opinion that the appeal should be allowed: see *Chitty's Statutes*, 4th ed., vol. 2, p. 1226; *Smith v. Matthews*, 30 L. J. Ch. 445.

MACLENNAN, J.A. :—

I am of opinion that the objections to the registration of the instrument of the 14th of March, 1893, raised by the defendants, ought not to prevail.

Section 44 of the Registry Act, R. S. O. ch. 114, provides that no affidavit shall be taken from a witness for the purpose of registration, unless he has subscribed his name in his own handwriting as such witness. Section 45 provides for cases in which instruments which do not require attestation, and which have not been attested by a subscribing witness, may nevertheless be registered.

The instrument now in question is not one which by law required to be attested by a subscribing witness, and therefore it could have been registered under section 45, even if there had been no witness to it. But Mr. Macdonnell had seen the instrument signed, and his name was subscribed to it in his own handwriting. I do not see that he was required to sign again in order to become a subscribing witness, or to enable him to make the usual affidavit, or that the proof was defective because his name

may have been written in the first instance with a different intent. Suppose there are several parties to a deed, and one of them executes it in the presence of a witness who attests it by his signature: some days afterwards the other parties execute the deed in presence of the same witness. Must he subscribe his name again, and if he do not, would the proof for registration be defective? I should think not. He can allow his former signature to stand good for all, and make one affidavit proving execution by all. So I think that in order to prove the execution of this instrument, which was signed in his presence, Mr. Macdonnell was not obliged to sign his name a second time, but could adopt his former signature for that purpose as an attesting signature.

But even if there were anything irregular in the proof for registration, it is cured by section 80, the effect of which is that, notwithstanding any defect in the proof for registration, an instrument, when once registered, shall constitute notice just as if there were no defect.

The next question is, as to the meaning of the instrument. It is contended that it is a mere contract to execute a mortgage; that the mere existence of the debt to be secured is not a sufficient consideration for such a contract, and that without some further consideration such a contract is *nudum pactum*, unless it be under seal. I do not think it is a mere contract to execute a mortgage. The instrument is composed of two parts, and such a construction gives no effect at all to the first part. The first part says: I agree to charge certain land with a certain debt, and then goes on to say, *and* I agree on demand to execute proper mortgages of said land to carry out this agreement, or to pay off said debt. Now, I think that in order to give effect to all the parts of the instrument, we must hold that the first part intends to give a present charge, that is, a charge merely equitable, to take effect at once, while the second part agrees, not presently, but on demand, either to pay the debt or to give a legal mortgage upon the land charged. I think that in this way we put

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Judgment. a reasonable construction upon the whole of the language used, and give effect to the intention of the parties. But **MACLENNAN, J.A.** it is said that "I agree to charge" is not the same as "I charge," and that therefore it is not a present charge, but a mere agreement to do something at a future time. I cannot accede to that contention. The debt to be charged was an existing debt with "arrears of interest," not a future debt or a debt not due, and just as the words "I agree to sell," or "I agree to buy," without more, mean "I do now sell," or "I do now buy," so here the words "I agree to charge" necessarily mean "I now charge."

The instrument, therefore, comes to this:—A debtor signs and delivers to his creditor a writing not under seal, saying: "I hereby charge my land (describing it) with payment of \$750 and arrears of interest which I owe to A. B." (his creditor), and the question is whether that is a good equitable charge. I think it is. A charge upon land for the payment of money is familiar enough. It is most frequently created by will, and the books are full of instances in which that method has been adopted by testators for securing the payment of debts or legacies. It may also be created by deed. "I charge Blackacre with the payment of \$1,000 to A. B.," if sealed and delivered as a deed, is a good charge by deed; so also it may be done by a contract for valuable consideration by mere signed writing not under seal, as, for example, if a borrower should sign a paper saying: "In consideration of \$1,000 now lent to me by A. B., I hereby charge Blackacre with the repayment thereof in three months," it is clear that is also a good equitable charge in favour of A. B. And whether it be by will, or by deed, or by contract, the effect is the same; the debtor has thereby given and the creditor has thereby acquired an equitable interest in land as security for the payment of his debt.

Now, the Divisional Court has decided that because there is no new consideration in the present case, nothing but the existing debt, there is in law no contract, and there being no contract, there is no charge and no interest

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in the land passed to the plaintiff; or, in other words, that a debtor cannot, by a mere signed writing not a deed, give his creditor an equitable charge on land by way of security for a debt already contracted and due, unless there be some new consideration, such as extension of time, etc. With great deference, I think a legal contract is not at all necessary; all that is required is that the interest which it is desired or intended to transfer should be transferred according to law. A debtor desires to transfer to his creditor, not the land itself or the legal title thereto, but a charge upon his land to secure the debt. What method has the law prescribed for making that transfer? Has it required the use of a deed, or may it be done by a mere signed writing? The question depends on the Statute of Frauds, not the 4th section, which relates to contracts and sales, but upon the 7th and 9th sections, which relate to trusts and confidences. The 7th section enacts that all declarations or creations of trusts or confidences of any lands shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing; and section 9 declares that all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by his last will. Before this statute "parol declarations, parol creations and parol alterations of uses were to all intents and purposes as effectual as any other mode whatsoever of charging estates": *per* Lord Chancellor Northington in *Wright v. Cadogan*, 2 Eden 257; see also, Sheppard's Touchstone, p. 519; 1 Sanders on Uses, p. 315; and the change made by the statute was merely to require what before might be done by parol to be done by a signed writing. Mr. Lewin, in his book on Trusts, 8th ed., p. 693, says, after referring to the 9th section of the statute: "A writing therefore is all that is necessary, but it is the practice to employ the same species of instrument and the same form of words in the transfer of equitable as of legal estates;" and to the same effect is Williams's Law of Real Property, 17th ed., p. 177:

Judgment. "Trusts or equitable estates may be created and passed from one person to another without the use of any particular ceremony or form of words. * * In the transfer of equitable estates it is usual, in practice, to adopt conveyances applicable to the legal estate; but this is never necessary. If writing is used, and duly signed, in order to satisfy the Statute of Frauds, and the intention to transfer is clear, any words will answer the purpose."

I am, therefore, of opinion that the debtor could create a charge in favour of his creditor by a signed writing as effectually as if he had done it by deed, and the instrument he has signed for the purpose is sufficient, without the statement, or even the existence, of any further consideration than the antecedent debt itself.

The judgment of the Divisional Court ought, therefore, to be reversed, and the judgment of the learned Chancellor must be restored.

BURTON, J.A.:—

I agree.

*Appeal allowed with costs.**

* See *In re Hurley's Estate*, [1894] 1 I. R. 488; *Cradock v. Scottish Provident Institution*, 69 L. T. N. S. 380; 70 L. T. N. S. 718.—**REP.**

DUTHIE V. ESSERY.

*Bills of Exchange and Promissory Notes—Endorsement by Stranger—53
Vict. ch. 33, secs. 56 and 88 (D.).*

Where a promissory note payable to a named payee is indorsed by another person before delivery of the note to the payee, the former is liable as indorser to a holder in due course by virtue of secs. 56 and 88 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.).
Judgment of the County Court of York reversed.

THIS was an appeal by the plaintiff from the judgment Statement.
of the County Court of York.

The action was brought to recover the sum of \$367.62, the balance due in respect of two promissory notes made by the defendant Essery, for \$147 and \$350 respectively, each dated the 15th of December, 1892, payable, two months and three months after date respectively, to George Duthie & Sons, or order.

The defendant Keith endorsed the notes before delivery thereof to the payees, who afterwards endorsed them, and the plaintiff became the holder after maturity.

Essery did not defend, but Keith contended that he was an accommodation endorser, and that in any event the note was not a negotiable instrument at the time he endorsed it, and that his endorsement, therefore, could not avail the payees.

The action was tried at Toronto, on the 9th of April, 1894, before His Honour Judge McDougall, who dismissed it with costs.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., and BURTON, and MACLENNAN, JJ.A., on the 24th of January, 1895.

J. Shilton, for the appellant. The case comes within section 56 of the Bills of Exchange Act, 1890, 53 Vict. ch. 33 (D.), and the respondent is liable as endorser: *Balcolm v. Phinney*, 30 C. L. J. 240; *Ayr American Plough Co. v. Wallace*, 21 S. C. R. 256; *Ex parte Yates*, 2 DeG. & J. 191; *Macdonald v. Whitfield*, 8 App. Cas. 733.

Argument. *J. F. Keith*, for the respondent. The law has not been altered by the Act, and the respondent is not liable: *Thew v. Evans*, 6 O. S. 60; *Jones v. Ashcroft*, 6 O. S. 154; *Skilbeck v. Porter*, 14 U. C. R. 430; *West v. Bown*, 3 U. C. R. 290; *Moffatt v. Rees*, 15 U. C. R. 522.

J. Skilton, in reply.

March 5th, 1895. BURTON, J. A.:—

I must confess that during the argument, having regard to the liabilities which the law merchant attaches to a person who though no party to the bill has written his name upon the back of it, and to a hazy recollection which I had of such cases as *Wilders v. Stevens*, 15 M. & W. 208, with which we were familiar at the time they were decided, I inclined to the opinion that although the plaintiff might have put himself in a position to recover, he could not do so against the endorser upon this note as it stands.

In such cases as I refer to the end was accomplished by the payees first endorsing to the party who had placed his name upon the note, adding the words "*sans recours*," or other similar qualification, and then again endorsing after such party to the subsequent holder. This strikes one as rather a clumsy contrivance, and an examination of the authorities has convinced me that it was unnecessary. No doubt a proper endorsement can only be made by one who has a right to the note and who thereby transfers the property and also incurs well defined liabilities. But we have the high authority of Lord Watson, even before the recent statute, that it is perfectly consistent with the principles of the law merchant, that a person who writes an endorsement with intent to become a party to a bill shall be held—withstanding that he has not, and therefore cannot give, any right to its contents—to be subject on a question with subsequent holders to all the liabilities of a proper endorser.

Here it is clear that the Duties declined to accept

Essery's note without the endorsement of Keith, and that he placed his name upon it, as he himself admits, to facilitate its negotiability.

Judgment.
BURTON,
J.A.

Such an endorsement on a bill to one who is about to take it is perfectly valid and efficacious, according to the law of England, but, as I understand the cases, it creates no obligations to those who were previously parties to the bill; it is solely for the benefit of those who take subsequently, and it is said as the transfer was not made until long after the notes were due the purchaser took them with all the infirmities to which they were subject in the hands of the original holders, and as they could not have maintained an action upon the notes against the endorser, neither can their transferee. But there is no infirmity in the notes themselves, and as the endorsement must in law be regarded as made for the benefit of subsequent holders, it appears to me to be immaterial when the transfer was made.

As it does not appear necessary, I prefer not expressing any opinion upon the clause of the recent statute. I think that in the main that Act is declaratory of the law as it was supposed to stand as settled by legal decision at the time of its passage. I believe it to be no uncommon thing to endorse notes or bills as we find these notes endorsed, but if I am right in my view that such notes could not be enforced by the payee, but only by a subsequent holder in due course, the sooner the practice is discontinued the better.

I am pleased to see a way to assisting the plaintiff out of his difficulty, but am not at all surprised at the learned Judge below feeling constrained to dismiss the action.

MACLENNAN, J. A. :—

The notes sued on were made by the defendant Essery, payable to the order of a firm of George Duthie & Sons. They were then endorsed by the respondent, the defendant Keith, in blank, and were delivered to the payees by the

Judgment. maker for valuable consideration. The payees then
MACLENNAN, endorsed them for value to the plaintiff; the endorsement
J.A. of the payees being written beneath the signature of the respondent Keith. The notes were duly presented at maturity, and dishonoured, and notice of dishonour was given in due course to the respondent. The respondent Essery allowed judgment to go by default, and the defendant Keith set up two defences, first, that he had endorsed without value, not for the accommodation of the maker, but for that of the payees; and secondly, that having regard to the form of the instruments and the position of his name thereon, he could not be held liable at all. The learned County Court Judge dismissed the action, and the plaintiff appealed. The first ground of defence was given up before us, and the respondent relied upon the second ground alone. It was not disputed that the respondent was well aware, when he endorsed the notes, that they were made by Essery for value as between him and the payees, and in fact they were made by Essery and endorsed by the respondent by way of renewal of other notes of exactly similar form, given to and held by the payees for value.

I am of opinion that the case is governed by section 56 of the Bills of Exchange Act, and that our judgment must be for the plaintiff.

The section referred to enacts, that "where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course, and is subject to all the provisions of this Act respecting endorsers." The section is in terms applicable only to bills, but by section 88, subject to certain provisions not here pertinent, the provisions of the Act relating to bills of exchange are made applicable with the necessary modifications to promissory notes, and it is declared that for that purpose the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first endorser of a note shall correspond with the drawer of an accepted bill payable to drawer's order.

Therefore when we wish to apply section 56 to a promissory note, such as that in question, we must read it thus : "Where a person signs a note otherwise than as a maker or payee," etc., for according to the terms of these notes the first endorser must be the payee. The defendant certainly did not sign either as maker or payee, and therefore by force of the statute, having signed it, he incurred the liability of an endorser to a holder in due course. It is clear that the plaintiff is a holder in due course, and the notes having been presented, and notice of dishonour having been given, the defendant is liable. See the opinion of the present Chief Justice of Canada, in *Ayr Plough Co. v. Wallace*, 21 S. C. R. 256 ; Byles on Bills, 15th ed., p. 168 *n* (f) ; Hodgins on Bills, p. 198 ; Maclaren on Bills, p. 319, *et seq.* ; Chalmers on Bills, 3rd ed., p. 176.

I therefore think that the appeal must be allowed.

HAGARTY, C. J. O. :—

I agree with the judgment just read.

Appeal allowed with costs.

IN RE WILLIAMS.

Executors and Administrators—Trusts and Trustees—Just Allowances—Costs of Unsuccessful Litigation—Advice of Court—R. S. O. ch. 110, sec. 37.

Where the administrators of the estate of a deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust committed by the intestate and being unsuccessful were obliged to pay the plaintiff's costs and those of their own solicitors, they were held entitled to credit for these payments in passing their accounts.

Where it is plain that a dispute can be settled only by litigation it is not necessary for a trustee to ask the advice of the Court before defending. Judgment of the Surrogate Court of Grey reversed.

Statement. THIS was an appeal by the administrators from the judgment of the Surrogate Court of Grey, and was argued before OSLER, J. A., in Chambers, on the 23rd of February, 1895.

E. D. Armour, Q. C., and E. T. Malone, for the appellants.

W. H. Wright, and N. W. Rowell, for the respondents.

March 11th, 1895. OSLER, J. A.:—

This is an appeal under section 33 of the Surrogate Courts Act, by the Toronto General Trusts Company, the administrators of the estate, from an order made by the Judge of the Surrogate Court of the county of Grey, refusing to allow them as part of their charges and expenses of administering the costs incurred and paid by them in defending an action brought against them by the assignee in insolvency of one McFarlane, in respect of the dealings of the intestate Williams, as a former assignee of McFarlane's estate.

The relevant facts, which I take from the judgment of the learned Judge, are that on the 5th of January, 1891, McFarlane made an assignment under the Insolvent Act (so to call it) to Williams, which he accepted, and called a meeting of the creditors, which was held on 17th of

January, 1891. The estate was reported to be of the value of \$1,372. Judgment.

OSLER,
J.A.

The assignor then made an offer for the estate of thirty-three and one-third cents on the dollar, to be secured by Williams. This was not accepted, and another creditors' meeting was held on the 12th of February, 1891, at which the assignor reduced his offer to twenty-five cents on the dollar. A resolution was passed at this meeting recommending the acceptance of twenty-five cents on the dollar, without discharge, or thirty-five cents on the dollar with discharge, to be secured by Williams. Nothing was done to carry out either proposal, and on the 21st of March, 1891, Williams, who had up to this time allowed the assignor to remain in possession of the estate and to deal with it as his own, died intestate, and on the 29th of May, 1891, the appellants were duly appointed his administrators.

No steps were taken by the creditors to appoint a new assignee of the insolvent estate until the 1st of September, 1891, when one Lawrence was appointed as such by Judge's order pursuant to the Act. By this time most of the estate had been disposed of and dissipated, no more than the value of \$120 coming to the hands of the new assignee.

On the 24th of November, 1891, the assignee having failed, as it is said, to effect any compromise or settlement with the appellants as Williams's administrators, brought an action against them alleging that Williams had agreed with the creditors to become responsible to them for the sum of twenty-five cents on the dollar of their claims, having accepted McFarlane's offer of that compromise, and claiming a declaration that the defendants were liable to pay the same out of the estate of the intestate coming to their hands. In the alternative, it was claimed that the appellants as administrators might be ordered to account for the assets come to the hands of the intestate under the assignment of the 5th of January, 1891, and of his dealings therewith.

Judgment.

OSLER,
J.A.

By their statement of defence the appellants denied that Williams had ever accepted the insolvent's offer of twenty-five cents on the dollar, or that he was responsible to the plaintiff or to the creditors therefor, and further alleged that if Williams was assignee he was trustee of the estate, and if it was at the time of his death vested in him it did not pass to the defendants as his administrators and that they had not taken possession of it, nor had any part of it come to their hands.

The action was tried before Street, J. The alleged agreement by Williams to pay twenty-five cents on the dollar was not proved, but the learned Judge held that his estate was responsible for the breach of trust committed by him in not taking care of the property and realizing the assets for the benefit of the creditors and that the extent of the liability was the value of the stock which he found to be fifty cents on the dollar on the stock list, taken at \$1,372, equal to \$686. From this he deducted the \$120 which came to the hands of the new assignee and gave the plaintiff judgment for \$566, payable out of the estate, and costs (afterwards taxed at \$228.32) payable out of the estate in the hands of the defendants or out of their proper goods if they had not so much of the estate in their hands to be administered.

On passing their accounts the appellants charged these costs and their own costs of defence, in all \$416, against the estate. The learned Judge disallowed all but \$150, on the ground that such costs had been needlessly and improperly incurred, and that they had not asked the opinion of the Court as to the propriety of defending the action or obtained permission to do so.

In disposing of this appeal I must reject the suggestion, to which some weight seems to have been attached by the learned Surrogate Judge, that the appellants had themselves been guilty of any breach of trust or neglect in regard to the McFarlane estate. That estate did not vest in them as Williams's administrators. They had no duties to perform in relation to it and could not have taken it out

of the hands of the person with whom he had left it, or to whom he had in breach of his duty as assignee delivered it. Those in default in this respect were the creditors who failed for so long to procure the appointment of a new assignee. Such breach of trust as had been committed was that of the intestate and in some manner and to some extent his estate in the hands of the defendants would have to answer it.

Judgment.

OSLER,
J.A.

The question then is whether the appellants in defending the action brought against them by the new assignee were guilty of such negligent or unreasonable conduct as to make it proper to deprive them of the right to be indemnified out of the intestate's estate in respect of the charges and expenses incurred in the litigation.

The 31st section of the Trustees and Executors' Act, R. S. O. ch. 110, enables executors to, among other things, compromise, compound or submit to arbitration, all debts, accounts, claims and things whatsoever relating to the estate of the deceased. It seems at least doubtful whether this power extends to administrators: Walker & Elgood's Law of Executors, 2nd ed., p. 154. But however that may be, there is nothing to shew that the question of a compromise was at any time seriously entertained. Looking at the nature of the claim set up by the plaintiff, it is evident that the parties were too far apart to arrive at a settlement until their rights had been ascertained by litigation of some kind. What the respondents chiefly rely upon is section 37 of the above Act, which provides that any trustee, executor or administrator may without the institution of an action make a summary application to the Court for advice or direction "on any question relating to the management or administration of the trust property on the assets of a testator or intestate."

There is no hard and fast rule that at the peril of bearing his own and his adversary's costs of litigation an administrator must seek the leave of the Court to defend an action or the advice of the Court whether he shall do so or not.

Judgment.

OSLER,
J.A.

In the work above cited, at p. 289, citing the authorities, it is said that "The object of the enactment is to assist trustees in the execution of their trust as to little matters of discretion; a petition under the Act should relate only to the management and investments of trust property. Therefore the Court will, not upon such a petition, construe an instrument, or make any order affecting the rights of parties to property. * * Neither will the Court give an opinion upon matters of detail, which cannot be properly dealt with without the superintendence of the Court and the assistance of affidavits." It appears to me to be clear that neither under our Act nor the English Act would the claim of the assignee have been considered one proper for a summary application to the Court under section 37. The claim was presented in the alternative, of liability on a contract by the deceased to pay the creditors twenty-five cents on the dollar on their claims, or for payment of the value of the assets left in possession of the assignor. Both of these were matters of wide dispute, not involving a mere question of damages or questions within the knowledge of the administrators. I do not see how it would have been possible for the Court, on a petition to which the assignee could have been no party and by no order on which would he have been bound, to give any direction to the administrators other than to leave the assignee to make out his claim in an action.

In the Court below reliance is placed on the recent case of *In re Beddoe, Downes v. Cottam*, 2 R. 223, a case which I think turns entirely upon certain new rules of Court which we have not introduced here. I quote again from the work of Walker & Elgood, p. 289: "In cases involving important and difficult questions, the proper course was formerly to bring an action, instead of presenting a petition under the Act, but now, the Court will determine any question arising in the administration of the estate without an administration by the Court, upon an originating summons, and these applications have practically superseded the Act."

The order referred to is Order LV., Rules 2 to 5, and in the case cited the question was a mere question of law arising upon undisputed facts, where it was evident that an action was unnecessary.

Judgment.

OSLER,
J.A.

But even under that order, which has not, as I have said, been introduced into our practice, I think such a case as the present where the facts and the measure or extent of the damages were so much in dispute would not have been disposed of without an action: *In re Powers, Lindsell v. Phillips*, 30 Ch. D. 291; *Wilson's Judicature Acts*, 7th ed., p. 407. Upon the whole, with the most sincere respect for the learned Judge, I am satisfied that he has taken too severe a view of the appellants' claim and that, subject to its being moderated in the usual way, or to any other special reason for reducing it, it is one which in principle ought to be allowed. The appellants must have their costs of the appeal.

Appeal allowed with costs.

HUNT QUI TAM V. SHAVER.

Police Magistrate—Justice of the Peace—Return of Convictions—Penalty—
R. S. O. ch. 76, secs. 1 and 3—R. S. O. ch. 77, sec. 6.

A police magistrate, acting *ex officio* as justice of the peace, is not subject to the provisions of sec. 1 of R. S. O. ch. 76, and need not make a return as therein required to the clerk of the peace.

Section 6 of R. S. O. ch. 77 exempts him from this duty whether he is acting as police magistrate or *ex officio* as justice of the peace. Judgment of the County Court of Leeds and Grenville affirmed.

Statement. THIS was an appeal by the plaintiff from the judgment of the County Court of the united counties of Leeds and Grenville.

The defendant was a police magistrate for the incorporated village of Newborough, in the county of Leeds, and as such was *ex officio* a justice of the peace for the united counties of Leeds and Grenville, but was not otherwise on the Commission of the Peace. On the 21st of May, 1894, an information was laid before the defendant charging the plaintiff with trespass upon certain lands in the township of North Crosby, and the defendant issued a summons calling upon the plaintiff to appear before him to answer the charge. This summons was on a printed form for use by a justice of the peace, and in the body of it the defendant was described as a justice of the peace, but it was signed by him with the addition to his name of the initials "P. M." The summons came on for hearing before the defendant at Newborough, on the 29th of May, 1894, and the plaintiff was convicted, the defendant being described in the conviction as "*ex officio* a justice of the peace," but after his signature were the initials "P. M." No return of this conviction was made by the defendant to the Clerk of the Peace for the united counties of Leeds and Grenville, on or before the second Tuesday in June, 1894, and the plaintiff contended that under R. S. O. ch. 76, sec. 1, the defendant was bound to make this return and not having made it was, under section 3 of same Act, liable to forfeit the sum of \$80.

The action was tried at Brockville, on the 12th of December, 1894, before His Honour Judge Reynolds, who, on the 29th of January, 1895, gave judgment in the defendant's favour. Argument.

The plaintiff appealed, and the appeal was argued before HAGARTY, C.J.O., and OSLER, and MACLENNAN, J.J.A., on the 8th of March, 1895.

Moss, Q.C., for the appellant. It is contended that section 6 of R. S. O. ch. 77, protects the defendant and makes inapplicable to him the provisions of section 1 of R. S. O. ch. 76, but this is giving too wide a meaning to the provisions of the former section. It is only when a police magistrate is acting as a police magistrate that he is relieved from the duty of making a return to the Clerk of the Peace. In the present instance the defendant was not acting as a police magistrate. It was only as justice of the peace that he had any jurisdiction in the case, and it is clear that he was exercising the jurisdiction that he was entitled to exercise, and so doing was bound to make the return: *Keenahan qui tam v. Egleson*, 22 U. C. R. 626.

Delamere, Q.C., for the respondent. Section 6 of R. S. O. ch. 77, is express in its terms, and it contains no limitation as to the nature of the jurisdiction that is being exercised, but applies to all police magistrates, whether they are acting as police magistrates directly or are so acting *ex officio*. The exemption is personal and not official. It is only by virtue of his appointment as police magistrate that the defendant had any jurisdiction whatever, and if the appellant's argument is adopted it would lead to the conclusion that a person acting *ex officio* as justice of the peace would, when so acting, be obliged to have the property qualification called for on the part of a person holding that office.

Moss, Q.C., in reply.

Argument. such as that now in question is certainly "for the good of the inhabitants of the municipality." Where there is power to license there is implied power to inquire as to the fitness of the applicant: *Horr and Bemis's Municipal Police Ordinances*, p. 14; *In re Bickerstaff*, 11 Pac. Rep. 393; and to refuse the license: *Child v. Bemus*, 21 Atl. Rep. 539. *Zanone v. Mound City*, 103 Ill. 552, is cited in the reasons against the appeal, but that was a case of mere arbitrary refusal of one out of many applicants, and in that case *Chicago v. Rumpff*, 45 Ill. 90, is referred to with approval, where it is expressly held that the character of an applicant for a municipal license may be inquired into. If there is power to refuse, the exercise of the power in good faith will not be interfered with: *Slattery v. Naylor*, 13 App. Cas. 446. Once the license is issued there is no power to revoke it, so that unless there is power to refuse the license the city is unable to exercise any control: *Bannan v. Toronto*, 22 O. R. 274.

E. E. A. Du Vernet and *J. E. Jones*, for the respondent. The sub-section in question, limiting, as it does, to some extent the common law right of trade, must be strictly construed, and so construed it is no justification for the exercise of the dangerous and arbitrary power here contended for: *Hardcastle*, 2nd ed., p. 134; *Regina v. Morris*, L. R. 1 C. C. R. 90, at p. 95. It gives the right to impose license fees for revenue purposes, but there is no power to refuse a license. There is power to regulate and punish, but none to refuse or revoke: *Hardcastle*, 2nd ed., pp. 182, 385; *Calder Navigation Co. v. Pilling*, 14 M. & W. 76. Where the Legislature has intended to give the power to refuse a license it has said so: section 479, sub-sections 4 and 7; section 489, sub-sections 25 and 26; *Virgo v. Toronto*, 22 S. C. R. 447. The fact that the Legislature by 57 Vict. ch. 50, sec. 8 (O.), has now given the power to refuse an auctioneer's license is very significant. Section 282 does not carry the case any further: *Regina v. Reeves*, 1 O. R. 490; *Regina v. Butler*, 22 O. R. 462.

Fullerton, Q.C., in reply.

March 5th, 1895. OSLER, J. A. :—

Judgment.

OSLER,
J.A.

So far as this appeal is concerned, the action is to be regarded as brought for a declaration that the defendants are not entitled to refuse to grant the plaintiff an auctioneer's license and to compel them to give such license, he having paid or tendered the proper fee as required by the defendants' by-law in that behalf, and for a declaration that so much of the said by-law as purports to give the defendants or their officers power to refuse a license when the applicant's character is not satisfactory to the police or other officers of the corporation, or for any other reason than nonpayment of the license fee, is bad, as being beyond the powers of the corporation.

The defendants justify their refusal on the ground that from information received by them they in good faith believed that the plaintiff was a person of notoriously bad character and of ill-repute, to whom they would not be justified in granting a license to carry on the business of an auctioneer, and they rely upon their by-law.

To this defence there was a demurrer, which Rose, J., allowed, and his judgment is the subject of the appeal. There was a further question before him as to the defendants' right to refuse to consent to a transfer to the plaintiff of a license which they had previously granted to a third person, but the judgment on that point is not complained of by the respondent.

This case does not present any peculiar difficulty, but there is an important principle involved in it. Municipal corporations, in the exercise of the statutory powers conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts. *A fortiori* should this be so where their by-laws are directed against the common law right, and the liberty and freedom, of every subject to employ himself in any lawful trade or calling he pleases.

The corporation has chosen to enact, first, that no one

Judgment.

OSLER,
J.A.

shall carry on the respectable business of an auctioneer without a license, and, second, that no one shall have a license to carry on such business unless his character shall be first reported on and approved by the police. The first is within their power; the latter as clearly is not.

Section 286 of the Municipal Act [55 Vict. ch. 42 (O.)] enacts that no council shall have the power to impose a special tax on any person exercising any trade or calling within the municipality or to require a license to be taken out for exercising the same unless authorized or required by statute to do so. The Constitutional Act, [30-31 Vict. ch. 3 (Imp.)] section 92, sub-section 9, enables a provincial legislature to make laws in relation to shop, saloon, tavern, auctioneer and other licenses, for the purpose of raising a revenue for provincial, local or municipal purposes; and section 495, sub-section 2 of the Municipal Act enables a city, town or county council to pass by-laws "for licensing, regulating and governing auctioneers and other persons selling or putting up for sale goods, wares, merchandise or effects by public auction, and for fixing the sum to be paid for every such license and the time it shall be in force."

No other section of the Act has been pointed out which can reasonably be construed as enlarging a power to license, regulate and govern auctioneers into one to refuse a license altogether in the discretion of an official named by the council, for that is the power which this by-law purports to confer. Taken by itself, an enactment which confers a power to pass by-laws for the purpose of licensing, negatives the existence of a power to prohibit. The common law right is or may be so far restrained, but no further, that a license to exercise it on payment of a nominal or reasonable fee may be required by the delegated authority of the legislature. Any one who is willing to pay this fee is entitled to the license, and when licensed must submit, if the legislative power has been further delegated, as it is by the section in question, to such reasonable provisions and restrictions for regulating and governing him in

exercising his right as the council see fit to impose. The fallacy of the argument for the appellants as to the construction of the section is that in assuming the exercise of the trade or calling of an auctioneer to be a mere privilege grantable in the discretion of the council, (in which case they might perhaps attach such conditions as they pleased to the acquirement of it) instead of a common law right, to the exercise of which they may attach by the authority of the Legislature the condition of taking out a license, and may regulate and govern the holder of such license. Where the Legislature has meant to confer a larger power on the council, as for example, to prevent the exercise of any trade or calling or to limit the number of those by whom it may be carried on, it has usually said so in plain language, and there is nothing in this section to shew that a larger interpretation of the language is called for than the words used, in their plain meaning, import.

Judgment.

OSLER,
J.A.

The respondents relied on the case of *Slattery v. Naylor*, 13 App. Cas. 446, in support of the contention that under a power to license, a power to prohibit might exist. The power there considered was one to license, etc., cemeteries, and the Court had no difficulty in arriving at the conclusion, having regard to the subject of the enactment and to other provisions in another statute, that there was power to prevent altogether the use of cemeteries within the municipality. That was a very different case from the present in every aspect of it, and it is, if I may say so, well distinguished in the judgment of Mr. Justice King, in *Virgo v. Toronto*, 22 S. C. R. 447, at p. 475, a case in which sub-section 3 of section 495 was in question, and in which this Court was of opinion, differing from the Supreme Court, that, under a power to license, regulate and govern, the council might define a part of the municipality in which the business of calling of hawkers or petty chapmen should not be carried on.

If the council can enact as they have done here, what is to prevent them from requiring the applicant for an auctioneer's license to produce as a condition of obtaining

Judgment.

OSLER,
J.A.

it, a petition signed by a prescribed number of ratepayers? Yet that, in the case of a tavern license, depends upon the express authority of section 11 of the Liquor License Act (R. S. O. ch. 194), as also does the right to require a report as to the character of the applicant for such license. We can hardly infer the existence of the larger power from more limited words. And if the applicant for an auctioneer's license may be made dependent upon the opinion of the police as to his character, why may not any other personal disqualification be attached to him, as, for example, his having been convicted of felony or any other offence?

In *Regina v. Vine*, L. R. 10 Q. B. 195, such a disqualification was only attached by the plain language of the statute, which enacted that no license should be granted to such a person. We should expect our Legislature to speak not less clearly. The decision now in appeal has indeed been recognized by them, as the sub-section of the section in question has been amended as to auctioneers by enabling the council to prohibit the granting of licenses to persons "not of good character": 57 Vict. ch. 50, sec. 8 (O.) Persons not of good character may, however, still be hawkers and peddlers, though it might well be thought that the limitation ought also be applied to them.

We are not called upon to express an opinion as to the prudence of such legislation, penalizing persons who desire to earn an honest livelihood, but the facility with which it may be obtained ought at least to induce us not to give a larger reading to sections empowering a council to pass by-laws of this kind than the language strictly calls for. For myself, I must say that I have never felt any doubt that my brother Rose's decision was a right and just one, and therefore, that this appeal should be dismissed.

I refer to *In re Barclay and Darlington*, 12 U. C. R. 86; *Bannan v. Toronto*, 22 O. R. 274; *Regina v. Johnston*, 28 U. C. R. 549; *Roberts v. Climie*, 46 U. C. R. 264; *Re Davis and Clifton*, 8 C. P. 236; *Calder and Hebble Navigation Co. v. Pilling*, 14 M. & W. 76; *Cooley's Com-*

stitutional Limitations, 5th ed., pp. 743, 745; *Johnson v. Mayor of Croydon*, 16 Q. B. D. 708; *Hay v. Justices of Tower Division of London*, 24 Q. B. D. 561; Dillon's *Municipal Corporations*, 4th ed., vol. 1, p. 395; *In re Frazee*, 63 Mich. 396.

Judgment.

OSLER,
J. A.

I have examined other American cases cited, but I must proceed upon the construction of our own statute and the law as derived from our own authorities.

MACLENNAN, J. A. :—

I am of opinion that this judgment should be affirmed.

It is not disputed that the Legislature of Ontario could confer upon a municipality the power to refuse an auctioneer's license on the ground of the applicant's character; but it is contended that the power has not been conferred, and that the by-law of the defendant corporation assuming to exercise that power is to that extent invalid.

The corporation relies upon the Municipal Act of 1892, section 495 (2), and sections 283, 285, and 286.

Section 495 (2), authorizes the city to pass by-laws: "For licensing, regulating, and governing auctioneers and other persons selling or putting up for sale goods, wares, merchandise, or effects, by public auction; and for fixing the sum to be paid for every such license and the time it shall be in force."

Section 283 enacts that: "Every council may make regulations not specifically provided for by this Act and not contrary to law for (certain specific purposes), and generally such other regulations as the good of the inhabitants requires."

Section 285 enacts that: "In all cases where * * any council or the board of commissioners of police in any city, or either of them, is or are authorized to pass by-laws for licensing any trade, calling, business, or profession, or the person carrying on or engaged in any such trade, calling, business, or profession, the council and the board of commissioners of police, respectively, shall have the power

Judgment. to pass by-laws for fixing the sum to be paid for such
MACLENNAN, license, for exercising any such trade, calling, business, or
J.A. profession, in the municipality, and enforcing the payment
of the license fee, and determining the time the license
shall be in force."

And section 286 enacts that: "No council shall have the power to give any person an exclusive right of exercising, within the municipality, any trade or calling, or to impose a special tax on any person exercising the same, or to require a license to be taken for exercising the same, unless authorized or required by statute so to do."

It was argued with great ability and force by Mr. Fullerton, that the power to license, regulate, and govern auctioneers necessarily included the power to withhold a license from persons of bad character, for otherwise an auctioneer might be guilty of a breach of every regulation made for his government, and, although convicted and punished therefor, could demand and compel a renewal of his license. So also he might be convicted of receiving stolen goods, and on his return from the penitentiary might demand a license, and set up a sign as a licensed auctioneer. Mr. Fullerton also argued that the only limit to the city's power of government was contained in section 286 above quoted, whereby the municipality is forbidden to create a monopoly of any trade or business.

There is danger of attaching too much importance to the argument of character and misconduct. We naturally dislike the thought of dealing with dishonest persons, or persons of bad character, or who have been convicted and punished for violations of the law. The law fixes the punishment for violations of it, but, as a general rule, it throws no obstacles in the way of persons who have suffered and undergone punishment afterwards engaging in any lawful trade or business. The offender is fined, or perhaps deprived of his liberty for a time, and so prevented for a time from engaging in any business or calling whatever. But when his punishment is over he must be allowed to earn a livelihood; and the spirit of modern legislation is, I

think, in favour of encouraging reformation and a return to honest ways of living rather than, by shutting the doors of employment, of driving such persons to further criminality. Judgment.
MAGLENNAN,
J.A.

Starting with this, that by the law of the land the right of every person to engage in any lawful trade or business is in no way dependent on his previous character, so long as he is in the enjoyment of his personal liberty, the question is whether the Legislature has, upon a proper construction of the language it has employed, authorized the city on the ground of character to prevent him from engaging in the business of an auctioneer, and that is the question which we have to decide.

The words "govern and regulate" are no doubt very large words, but in themselves they cannot, as it seems to me, when applied to a class of persons, extend to giving power to exclude from the class to be regulated and governed. What the municipality is authorized to do is to regulate and govern a certain class of persons. To exclude a person from that class is one thing; to regulate and govern is another, and different thing. If the words were to regulate and govern the *business* of selling by auction, that would be different. It would then be like the New South Wales case of *Slattery v. Naylor*, 13 App. Cas. 446, where the power given by the statute was to make by-laws regulating the interment of the dead. I therefore think it lies upon those who assert the power of exclusion to make it out from the language of the statute rather than upon those who differ from them to shew the contrary. The language used does not in its ordinary natural signification and meaning confer the power. And I think that not only is there nothing in the Act indicating that the power was intended to be conferred, but much to the contrary.

An auctioneer is a person who sells property of any kind by public auction. For some reason the statute seems not to extend to persons selling *land* by auction, or any thing but goods, wares, merchandise, or effects; that is to say, personal property. It may, perhaps, be assumed that

Judgment.
MACLENNAN,
J.A.

it is intended to apply only to persons who make sales by auction their business, although it says "other persons selling or putting up for sale," and that it is not to apply, for example, to a person selling his own household furniture in that manner. But the business of an auctioneer may either be the selling of his own goods, or the goods of others, or it may combine both. There is no reason why a shopkeeper should not carry on his business altogether by auction, or partly by that method, and partly by ordinary sales over the counter. The Act makes no distinction, all persons selling by auction may be regulated and governed. I myself can see no reason why a person selling his own goods by auction should be regulated and governed any more than his neighbour who sells his goods over the counter in the ordinary way. I suppose those intended to be reached are the probably more numerous class who sell by auction the goods of others. But when it comes to prevention the case is very serious. Did the Legislature intend that a man's right to sell by auction his own goods, in his own shop, for both of which he pays taxes like his neighbours, should be taken away because he is supposed not to have a good character?

Whatever reasons there may be for regulating and governing such a mode of selling goods, and for exacting a license fee from those engaged therein, I can see none for going beyond the language used by the Legislature, or for straining it so as to exclude from its exercise persons of bad or questionable character.

Again, auctioneers are in respect of the present question put on the same footing exactly as bill posters, hawkers, peddlers, petty chapmen, and other persons carrying on petty trades: section 495, sub-sections 2 and 3. It would seem an extraordinary thing to suppose the Legislature intended a moral investigation into the characters of all such persons before they should be allowed to exercise their respective callings. Many reasons occur to the mind for licensing, regulating, and governing such persons, but to mine at all events none for prevention on the ground of

character. In the case of *Virgo v. Toronto*, 22 S. C. R. 447, both Mr. Justice Gwynne and Mr. Justice King point out that under sub-section 3 these petty tradesmen are to some extent exempt from license altogether, and therefore as they seem to decide exempt also to the same extent from regulation and government. If that be so, and if in respect of some of their dealings they may be prevented from following their respective trades or callings, the strange anomaly would result that a peddler of bad character might ply his trade, without license or restriction, with one part of the community, while prohibited altogether from doing so as to the rest.

Again, it is to be observed, that in other sections of the Act, where it was intended to confer a power of prohibition, the Legislature has used express language for the purpose. In *Virgo v. Toronto*, 22 S. C. R. 447, at p. 466, Mr. Justice Gwynne calls attention to a number of such cases in the Act. To my mind the inference is almost irresistible that if the Legislature had intended to confer prohibitory power in respect of auctioneers, similar clear language would have been used as in other cases. Especially is this so, as the Municipal Act has been revised and consolidated and re-enacted many times since the clause in question relating to auctioneers was first enacted in its present form, which was before the consolidation of 1859.

We are also led to the same conclusion by the fact that the Legislature at its last session passed an Act whereby the section in question was amended by giving expressly the power referred to : 57 Vict. ch. 50, sec. 8 (O.).

The question remains whether the appellants are assisted by sections 283, 285, and 286. I do not think they are. The only section which to my mind gives any apparent support to the contention is the first, which authorizes all councils to make such regulations as the good of the inhabitants requires. The argument proves too much, for if it is good then the power which is claimed can be exercised not merely by counties, cities, and separated towns, as limited by section 495, but by all municipal councils. It is evident,

Judgment.

MACLENNAN,
J.A.

Judgment, therefore, that the regulations authorized by section 283
MACLENNAN, do not include the present subject.

J.A.

The case of *Hodge v. The Queen*, 9 App. Cas. 117, was relied on for the appellants, but it gives no support to their contention. The power given to the license commissioners is very large. They are authorized not only to regulate taverns and shops to be licensed, but also to define the conditions and qualifications requisite for obtaining licenses, and also to limit their number; and the great question in that case was whether the Legislature could delegate its power to the commissioners.

I therefore think there is no power of prohibition in this statute by the refusal of a license, either express or implied, and that the appeal should be dismissed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal dismissed with costs.

CAMPBELL V. HALLY.

Assignments and Preferences—Compromise by Assignee—Action by Creditor
—R. S. O. ch. 124, sec. 7.

Where a creditor obtains an order under sub-section 2 of section 7 of the Assignments and Preferences Act, R. S. O. ch. 124, authorizing him to bring an action in the assignee's name, the action as brought must be such as is justified by the scope of the order.

A creditor suing in the name of the assignee under this sub-section cannot attack the *bona fides* of a compromise entered into before his action was brought between the assignee and the defendant, when the defendant cannot be restored to his original position.

Whether sub-section 2 is not confined to cases in which an exclusive right of suing is given to the assignee by sub-section 1: *quære*.

Judgment of the Queen's Bench Division reversed, MACLENNAN, J. A., dissenting.

THIS was an appeal by the defendant from the judgment of the Queen's Bench Division. Statement.

One Mary Brown, who was a retail dealer in boots and shoes, made a chattel mortgage on the 1st of March, 1892, in favour of the defendant, who was a wholesale dealer in rubber goods, to secure the amount of her indebtedness to him, and on the 27th of October, 1892, he made a seizure under the chattel mortgage, and afterwards sold the goods. On the 31st of October, 1892, Mary Brown made an assignment for the benefit of her creditors to W. A. Campbell and G. H. May, pursuant to the provisions of R. S. O. ch. 124. Negotiations took place between the defendant and the assignees as to his claim, and a settlement was arrived at, the defendant paying to the assignees \$400 out of the proceeds of the sale of the goods and abandoning any claim to rank upon the estate, and the moneys were distributed. On the 13th of January, 1893, an order was made by his Honour Judge Chadwick, pursuant to the provisions of sub-section 2 of section 7 of the Assignments Act, R. S. O. ch. 124, on the application of William Griffith & Co., creditors of Mary Brown, authorizing them "to take proceedings to ascertain the interest of John Hally in the effects mentioned" in the chattel mortgage, and "to get in and recover for the benefit of William Griffith & Co. any

Statement. balance or surplus there may be after allowing the mortgagee any moneys remaining due, owing and unpaid on such mortgage," and directing that "such proceedings may be taken in the name of the said assignees, * * but at the expense and risk of the said William Griffith & Co." On the 27th of January, 1893, this action was commenced by William Griffith & Co., in the name of Campbell and May, and, after setting out the facts as to the making of the chattel mortgage and as to the sale, the plaintiffs alleged that the defendant claimed that the sum of \$5,797.05 was due to him, and refused to pay over to the plaintiffs, as assignees of Mary Brown, any surplus other than \$68.83. They then claimed that an account might be taken, (a) of what was due to the defendant under the mortgage; (b) of the amount realized by the defendant from the sale of the mortgaged goods; and (c) of what, but for the defendant's default and want of reasonable care might have been realized from the goods, and they asked payment to them of any surplus. The defendant pleaded the compromise and settlement as a defence to the action, and in reply the plaintiffs said that they were induced to enter into the compromise and settlement by the fraudulent misrepresentations of the defendant, and charged that the defendant, with intent to deceive them, had misrepresented the actual state of the accounts between himself and Mary Brown.

On these pleadings the action came on for trial at Guelph on the 3rd of April, 1893, before ROSE, J. The objection was taken that the action as framed was not authorized by the order of his Honour Judge Chadwick, and after a long discussion between counsel as to the facts, on this objection the action was dismissed with costs, but on appeal to the Queen's Bench Division a new trial was ordered, the following judgment being delivered by

STREET, J.:—

Upon the face of the proceedings this action is brought by the assignees of Mary Brown for an account of the

dealings of the defendant as mortgagee with certain property mortgaged to him by the insolvent, in respect of which it is alleged that a balance is due from the defendant. There is nothing upon the record to shew that the plaintiffs upon the record are not the beneficial plaintiffs or that any other persons are interested in the result. Further than this it does not appear apart from the record that the plaintiffs upon the record are in any manner dissatisfied with the proceedings which are being taken in their names by the persons who claim to be entitled to the fruits of the action. Under these circumstances it appears to me to be unnecessary at the present stage of the action that we should consider whether the form in which it has been brought is that which is authorized by the order of the County Judge, because, even if not authorized by that order, the issue upon the record which came down for trial was not that which the learned Judge decided. The issue which he decided was one which could not dispose of the cause of action upon its merits, but which might have formed the subject of an application in Chambers to stay the proceedings; it was not an issue between the plaintiffs and the defendant, but between the plaintiffs and Griffith & Co., with which the defendant had nothing to do. For all that appears to the contrary, this action in its present form may have been brought with the sanction and consent of the plaintiffs on the record. They may desire that the questions raised upon the pleadings may be determined in the present action; the defendant may be plainly liable to an account, and yet, if the present judgment stands, it is manifestly a bar to any further proceeding by any person to compel him to give it.

Judgment.
Street, J.

I am of opinion, however, with great respect, that the order of the County Judge was an authority to Griffith & Co. to take the proceedings which they have done by bringing the present action in its present form against the defendant. They only seek to recover from the defendant the balance in his hands as mortgagee after deducting the amount of the mortgage money due him, and this is what

Statement. the order allows them to do. The fact that the defendant pleads a settlement, and that they reply that the settlement, if any, is invalid by reason of fraud in obtaining it, does not alter in any way the nature of their demand. They were not bound to begin by setting out the fact that the defendant had committed a fraud; the settlement was a matter of defence which might or might not have been set up; had it not been set up, the question of fraud would not have appeared in the case at all. The fact that the defendant's pleading has rendered it necessary for the plaintiffs to raise it cannot alter the nature of the plaintiffs' cause of action.

I am of opinion, therefore, that the judgment for the defendant should be set aside and a new trial ordered, and that the costs of the former trial and of this motion should be costs to the plaintiffs in any event.

The defendant appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 22nd and 23rd of January, 1895.

Shepley, Q. C., for the appellant. The plaintiffs upon the record, by compromising the matters in question in this action, had disentitled themselves to bring the action without first successfully impeaching the compromise. The right of a creditor to bring an action under the statute for his own benefit is not a separate or substantive right. He cannot bring actions which the assignee is unable to bring. The disability of the assignee is the creditor's disability also. The terms of section 7, sub-section 2, of the Assignments Act, R. S. O. ch. 124, plainly shew this. The creditor, in other words, may obtain an order, under the statute, entitling him to maintain, for his own benefit, an action which the assignee is able, though unwilling, to maintain; but the creditor cannot obtain an order entitling him to maintain, for his own benefit, an action which the assignee is both unable and unwilling to maintain. The

Argument.

statute only professes to surmount, in favour of the creditor, the obstacle caused by the refusal or neglect of the assignee, not the obstacle caused by his disability. The creditor's right, therefore, to maintain the action here brought, being measured by that of the assignees, could not arise until the compromise entered into by the assignees had been successfully attacked and the order should not have been made. While that compromise stood it was a complete bar to any such action as the present, at the instance either of the assignees or of creditors using the assignees' names under the statute: *Keyes v. Kirkpatrick*, 19 O. R. 572. Then the action as framed is not authorized by the order. The creditor who obtained the order from the County Court Judge under which this action was brought, did not, and does not, pretend to have asked for an order entitling him to impeach the compromise directly. Nor does he pretend that he had laid the statutory foundation for obtaining such an order. Under the statute he is bound to shew the neglect or refusal of the assignees to take the proceeding which he asks the Judge to permit him to take. Here the refusal of the assignees was a refusal to bring the action which by the compromise they had disabled themselves from bringing, viz., the action for an account, and the order made permits the complaining creditor to bring that action only. Had the assignees refused to bring an action to impeach the compromise, then possibly the creditor might have obtained an order permitting him to do so, but there was no such refusal, nor has any such order been obtained. Then the plaintiffs do not offer to restore and cannot restore the consideration which passed from the defendant on the compromise, or put the defendant into the position he occupied before it, and a contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*: *Clarke v. Dickson*, E. B. & E. 148; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145; *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214.

Argument.

Johnston, Q. C., and W. H. Cutten, for the respondents. The learned Judge should not have dismissed the action on the ground that the action was not authorized by the order. That order is not referred to in the pleadings; the defendant was not a party to it, and was not entitled to take any objection to it or to the form of action. The order has reference to the application of the proceeds of the action (if any) and is a matter solely between the nominal plaintiffs, the assignees, and the beneficial plaintiffs, the creditors. Whether the action is or is not in accordance with the order is not an issue on the record. The questions raised upon the pleadings should be tried in the present action. The defendant may be liable to account, and the judgment, if it stands, is a bar to any further proceedings by any person to compel him to give it. But the action was authorized by the order. It was an authority to the creditors to take proceedings, in the present form, against the defendant. The nature of the demand is not altered in any way by the facts that the defendant pleads a settlement, and the plaintiffs reply that such settlement was induced by fraud. The plaintiffs were not bound to begin by setting out that the defendant had committed a fraud. The alleged settlement was a matter of defence which might or might not have been set up, and if it had not been set up, the question of fraud would not have appeared at all. The fact that the defendant's pleading has rendered it necessary for the plaintiffs to raise the question cannot alter the nature of their cause of action. The question is, after all, solely one of pleading, and an amendment should be allowed if necessary. The payment of \$400 by the defendant creates no difficulty. That will be mere matter of account.

Shepley, Q. C., in reply.

April 5th, 1895. HAGARTY, C. J. O.:—

I agree that the order of the County Court Judge was improvidently issued, and that the defendant could have moved against it.

It is not easy to see how a creditor could be allowed under the statute to claim for his own benefit an amount alleged to be still owing by a debtor, after that claim had been settled, the alleged debtor compromising with the estate, paying the assignee a sum of \$400 and giving up his claim to prove on the estate. The assignee, if imposed on by fraud or concealment of facts could, we may assume, have proceeded to impeach the settlement, or possibly the judge might direct such a step to be taken. But in such a case the assignee would properly have to arraign the settlement in the first instance as his case against the defendant.

Judgment.

HAGARTY,
C.J.O.

Here the plaintiffs' claim ignores the settlement. The defendant has to plead it as his defence, and the creditors, using the assignees' names, reply the alleged fraud.

I do not think this can be allowed either in a suit really brought by the assignee or by a creditor in the assignee's name.

It is conceded that such a settlement took place. It does not appear in evidence what proceedings may or may not have taken place in the settlement of the estate, distribution of assets, or payment of dividends, which might render an opening of the alleged settlement possible or impossible.

On the whole I do not dissent from the rest of the Court, although I think it would have been better to have examined the assignee, who was in Court, who could probably have put the case beyond question as to his own position and that of the estate.

BURTON, J. A. :—

Whatever may be the proper construction of sub-section 2 of section 7 of the Act respecting Assignments and Preferences, R. S. O., ch. 124, it is too late in this Court to hold it to be confined to those cases in which an exclusive right to sue is given to the assignee under sub-section 1 of that section ; besides, the words of sub-section

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BURTON,
J.A.

2 are very broad and would seem to extend to any case in which any agreement or asset of the insolvent, which might be enforced or sued for for the benefit of the estate, but which the assignee, under the authority of the creditors generally, refuses to enforce or sue for, is the subject of the litigation; but it is, I think confined to such cases and would not extend to a case like the present, where the creditors themselves have chosen to authorize the compromise of a disputed claim. I should have thought, but I speak with diffidence, as I find there is a difference of opinion upon the point, that the assignee, though suing for the benefit of the creditors generally, would not be at liberty to do so until he had placed the original debtor *in statu quo*. There would seem to be a great hardship in allowing such an action to be brought until that condition had been complied with. Assume, for instance, a case in which the assignee had collected and distributed all the other assets of the estate and was instructed by a majority of the creditors to institute proceedings like the present—a large number of the creditors being satisfied with the compromise, and another portion of them who had received their distributive proportion being utterly incapable of returning the amount—the case of the compromising debtor would strike one as a very hard one; it would not be reasonable to cast a responsibility upon the assignee, who was merely carrying out the wishes of the creditors, nor would it be reasonable to compel the assenting creditors to refund who all along had been satisfied with the compromise, and the revived right of the alleged debtor, in the event of his being found in the result to be a creditor, to rank on the estate would be a very barren one.

It may be said that the same reasons would apply if the compromise had been made by the insolvent before the assignment; but would the insolvent have been entitled to succeed in rescinding the compromise without restoring the creditor to his former position, and could the assignee be in any better position?

But, however that may be, I think this case does not come within the statute. The action is purely statutory and cannot, I think, extend to a case of this kind, in which the compromise has been effected by the assignee under instructions from the creditors and for the benefit of the estate, and where it is not possible in this action to afford complete relief. Any attempt to make the general body of creditors parties must, I should say, necessarily fail. Those who have all along been satisfied with the compromise might well say: We think the compromise a fair and reasonable one, and that it ought not to be disturbed, more especially as we have no interest in this litigation which, even if successful, will enure for the benefit of the creditors who have initiated this proceeding and not for us.

Judgment.

BURTON,
J.A.

I am of opinion, therefore, that notwithstanding the very general words of the statute, this case does not fall within it. If it does any dissentient creditor might reverse the decision of the great body of creditors acting in good faith in authorizing the compromise of a doubtful claim long after that compromise had been acted upon and carried out by the distribution of the proceeds.

I suppose an action of deceit, if the facts warranted it, would be maintainable by the assignee, but whether that would give a right of action under sub-section 2, it is unnecessary to hazard an opinion.

I am of opinion that the appeal should succeed and the original judgment be restored.

OSLER, J. A. :—

When the object of the action is considered as disclosed in the statement of claim and the reply, it is manifest that the plaintiffs have not complied with Consolidated Rule 404, which provides that every statement of claim shall state specifically the relief which the plaintiff claims simply or in the alternative, and here, as the case was finally presented, it was an essential part of the relief sought, and a necessary condition to the right to obtain an account,

Judgment.

OSLER,
J.A.

that the compromise and settlement made between the assignees and the defendant should be set aside. This, however, was neither authorized or apparently contemplated by the order, within the limits of which the relief sought by the statement of claim was strictly confined.

The 7th section of the Assignments Act, R. S. O. ch. 124, enacts that, save as provided in the next succeeding sub-section, the assignee shall have the exclusive right of suing for the rescission of agreements, deeds, and instruments, or other transactions, made or entered into in fraud of creditors, or made or entered into in violation of the Act. Then follows sub-section 2: "If at any time any creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the trustee (*sic*) under the authority of the creditors or inspectors, refuses or neglects to take such proceeding, after being duly required so to do, the creditor shall have the right to obtain an order of the judge authorizing him to take the proceedings in the name of the trustee, but at his own expense and risk, and upon such terms and conditions as to the indemnity to the assignee (*sic*), as the judge may prescribe, and thereupon any benefit derived from the proceedings shall belong exclusively to the creditor instituting the same, etc."

It appears to me, I confess, extremely doubtful whether the proceedings which a creditor may thus obtain an order to take for his own benefit are not limited to those which by the first part of the section the assignee (save as provided by the second part) is declared to have the exclusive right of taking. In other words, whether the whole section ought not to be regarded, the first part indicating the scope of the second. I am aware that in practice a different view has frequently been acted upon and that even debts which the assignee has regarded as bad or doubtful, instead of being assigned to the creditor, so as to be sued in his own name, have been sued by him in the name of the assignee under the supposed authority of the section.

Assuming, however, that an order might properly be

made in the terms of the one under which this action was brought, and in effect to assign to a creditor the assignees' right to an account for the proceeds of goods sold under a mortgage from the insolvent, the position of the parties and the relief really sought in the present action must be considered.

Judgment.

OSLER,
J.A.

The creditors seek not merely to have the mortgage account taken, which is all that in terms the order authorized the action to be brought for, but also as an essential preliminary to that relief to set aside the compromise and settlement made between the assignees and the defendant, under which the latter paid to the former, for the benefit of the creditors generally other than himself, the sum of \$400, and agreed to abstain, and did, as was stated, abstain for the benefit of the same creditors from ranking on the insolvent estate for a large unsecured claim.

It is trite law that contracts, or compromises, or settlements, which may be impeached for fraud, are not void but voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party, if the contract, compromise or settlement be disaffirmed or set aside, can be remitted to his former condition. If this cannot be done the contract cannot be rescinded and the party defrauded is left to his action for deceit: *Urquhart v. Macpherson*, 3 App. Cas. 831; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; *Clarke v. Dickson*, E. B. & E. 148; *Fraser v. McLean*, 46 U. C. R. 302; *Trigge v. Lavallée*, 9 Jur. N. S. 261.

Now, if this were really the assignees' action, and they were seeking to set aside the compromise for the benefit of the estate, it may be (though I do not concede so much) that it would, as was argued, be a mere matter of accounting as between debtor and creditor as regards the money payment of \$400, so that if the account were found in favour of the defendant on the compromise being set aside, he could be placed in the same position by a direction to repay it to him out of the estate, while his right to rank for his unsecured claim would at once revive against the

Judgment.

OSLER,
J.A.

estate whose representatives had succeeded in setting aside the settlement. But the case bears a wholly different complexion. It was proved by the production of the Judge's order and by the admission of counsel at the trial that the action is not the action of the assignees; that though nominally parties plaintiff they are not really prosecuting it, and that it is not being carried on at the instance of or for the benefit of the estate or the creditors generally. It is strictly the private statutory action of the individual creditors, having no analogy whatever to a creditor's action for administration of the estate, or to an action brought by one of a class for the benefit of himself and all others of the same class. Suppose the compromise set aside how can the defendant be remitted to his former state? Clearly no judgment can be given against the assignees or the estate for the repayment of the \$400 or any part of it should it turn out that the accounts are in favour of the defendant (and it ought to be paid to him whether the accounts are in his favour or not). And as to ranking upon the estate for his unsecured claim, the position of the assignees and the general body of creditors and their right to insist upon retaining the advantages they have gained by the compromise cannot be affected by a proceeding which, as to them, is *res inter alios acta*. The right to rank on the estate could not, in that case, revive. It may be said that Griffith & Co. (the creditors who obtained the order) might be made parties to the action, and a judgment or order given against them. I take leave to doubt that. The defendant is not bound, nor indeed, I think, has he the right, to make them parties. The action is a statutory action, constituted as the statute requires it to be constituted, and the defendant's right is to shew that so constituted the relief sought cannot be granted because he cannot be placed in his former position. The Act gives the creditor no right to interpose himself and offer terms, which, indeed, he does not do, as the condition on which he shall obtain the relief he seeks in the action he is prosecuting in the assignee's name.

If the action is one in which relief cannot be granted without affecting the estate, or in which the defendant has, as in this case, the right to say: You cannot place me in the same position that I was in with regard to the estate when the compromise was made, if you set it aside, I think it is not an action which a creditor can bring under the statute.

Judgment.

OSLER,
J.A.

I think it is essential that the action should appear, as regards the relief sought, to be strictly such an action as is in terms authorized by the order made under the section.

On two grounds, therefore, I am of opinion to allow the appeal and to restore the judgment of my brother Rose: 1st. The action is shewn not to be the action authorized by the order, so far as it seeks to set aside the compromise; and 2nd. It appears that if the nominal plaintiffs were to succeed in setting aside the compromise the judgment could not place the defendant in his former state, either as to ranking on the estate for his unsecured debt or as to the return of the money paid by him if on taking the accounts the result should be in his favour or otherwise.

MACLENNAN, J. A. :—

I am of opinion that this appeal fails.

If we regard the pleadings as they stood at the trial, and as they still stand, there can be no doubt a case is stated which the plaintiffs are entitled to have tried. Unfortunately, as I think, the counsel at the trial, with a view of shortening the proceedings, entered upon a discussion of the law of the case without agreeing upon the facts, or putting so much of them as were not in dispute in a definite tangible form. The result was that I think the case was not brought before the learned Judge in a condition to enable him to decide effectually upon the rights of the parties. It seems to have been admitted before him that there had been a compromise between the plaintiffs

Judgment. and the defendant of the very matters in question, but then
MACLENNAN, it was insisted, that the compromise was not binding
J.A. on the plaintiffs because it had been obtained by the defendant by fraud and misrepresentation. It was also admitted that a creditor, had, before commencing the action obtained leave, under R. S. O. ch. 124, sec. 7 (2), to bring it in the name of the plaintiffs, and it was contended that the plaintiffs could not succeed because they must first get rid of the compromise, and the action was not brought for that. This is the objection to which effect was given by the learned Judge, and on which he dismissed the action. The objection is certainly very plausible, and was forcibly put by Mr. Shepley. I think, however, it is completely answered by the reasons given by my brother Street in the Divisional Court. What the plaintiffs want is an account. They say that on a proper account there will be a sum due to them. The defendant says the account has already been gone into, and has been compromised. The plaintiffs, or rather the creditors using their name, reply that the alleged compromise is no compromise at all, it is void, it is nothing at all, because of fraud, and that it cannot stand in the way of their right to an account. If they succeed they get just what they asked for, and what the order of the County Judge authorized them to ask for. But besides, the plaintiffs are trustees for creditors. They did not require the authority of the statute to bring such an action. If they were drawn into a compromise by fraud, they could themselves bring just such an action and meet the defence of compromise just as they have done here, and if any creditor desired to bring the action he could do so either in the name of the assignees or in his own name, making the assignees defendants. A trustee was not obliged to take proceedings in his own name against his will or judgment, without an indemnity, but with indemnity he could not refuse the use of his name in actions at law; and in suits in equity the *cestui que trust* could gain the same end by making the trustee a defendant if he refused to be plaintiff. In the

present case the assignees have not made any objection, if they could do so, to the use of their names; but if they had it is altogether a question between them and the creditors. The creditors are the persons interested in the result, and that being so the defendant can raise no objection, but must defend himself against the claim just as if the plaintiffs were themselves attacking him.

Mr. Shepley also contended that the compromise having been carried out, it can not now be questioned, and he cited *Clarke v. Dickson*, E. B. & E. 148, and the cases in the House of Lords in which that decision was approved of. Those cases merely shew that a contract obtained by fraud will not be rescinded unless the parties can be restored to their original position. That may turn out to be the case here, but it is not easy to see, from the discussion that took place, that anything more can be required to restore the defendant to his original position than the payment of a sum of money, which, of course, can present no insuperable difficulty. If it turns out that that has to be done, the plaintiffs can only have relief upon condition of their paying it. A vendor of land who has been induced to sell by fraud can still set aside the contract, although he has received part of the purchase money. He gets relief on condition of paying back what he has received, and so, if this defendant has paid anything in carrying out the compromise which he ought to receive back in case it is set aside, relief will be given to the plaintiffs only on condition of that repayment being made, and if not made the action will be dismissed with costs.

I therefore think that the appeal should be dismissed.

Appeal allowed with costs,
MACLENNAN, J. A., *dissenting.*

Judgment.
MACLENNAN,
J. A.

BLOOMFIELD V. HELLYER.

Mortgage—Default—Emblements—Bills of Sale and Chattel Mortgages—Entry by Mortgagee.

A mortgagor after default is, as far as crops growing upon the mortgaged land are concerned, in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land, or any one claiming under him, who has entered into possession of the land before the crop is harvested.

Laing v. Ontario Loan and Savings Company, 46 U. C. R. 114, explained. Judgment of the County Court of Brant reversed.

Statement

THIS was an appeal by the defendants from the judgment of the County Court of Brant.

The action was brought to recover from the defendants the value of a crop of wheat claimed by the plaintiff under a chattel mortgage made in his favour by one James H. Kalar, who at the time the chattel mortgage was given by him was the owner of the land on which the wheat was growing, subject, however, to a mortgage in favour of the Synod of the Diocese of Huron, which was in default. The chattel mortgage was given to secure the repayment of moneys advanced to the mortgagor which were paid over by him to the Synod of Huron on account of their mortgage. After the chattel mortgage was given, and before the wheat was ripe, the Synod of Huron took proceedings for sale under their mortgage and also obtained judgment for possession. They then sold the land to the defendant Hellyer and put him in possession, and he re-sold to his co-defendants. These defendants claimed that the crop of wheat passed to them with the land, and harvested it, and this action was then brought. The amount realized by the Synod of Huron was more than sufficient to pay their claim. The defendants contended that the title to land was brought in question, and that the County Court had no jurisdiction.

The action was tried before his Honour Judge S. J. Jones, at Brantford, on the 2nd of October, 1894, and on

the 24th of November, 1894, he gave judgment overruling the objection as to jurisdiction and in the plaintiff's favour on the merits. Statement.

The defendants' appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 7th and 8th of March, 1895.

Moss, Q. C., for the appellants. The title to land is brought in question in this action, growing crops being an interest in land, and therefore the County Court had no jurisdiction to entertain and try the action: *Trainor v. Holcombe*, 7 U. C. R. 548; *Portman v. Patterson*, 21 U. C. R. 237; *Coulson v. O'Connell*, 29 C. P. 341; *McNeill v. Haines*, 13 P. R. 115; *Seabrook v. Young*, 14 A. R. 97; *Talbot v. Poole*, 15 P. R. 99. Even if, however, there was jurisdiction in the County Court the judgment is, on the merits, clearly wrong. The effect of the judgment is that the chattel mortgagee is in a better position as against the mortgagee of the real estate than the mortgagor. Clearly the mortgagor would have had no claim to the crops. He is, after default, in the position of a tenant at sufferance: *Keech v. Hall*, 1 Sm. L. C., 9th ed., p. 546; *Moss v. Gallimore*, 1 Sm. L. C., 9th ed., p. 604; and in the absence of a special contract between himself and the mortgagee, he is not entitled to emblements: *Christophers v. Sparke*, 2 J. & W. 223, at p. 234. *Ex parte Temple*, 1 G. & J. 216, is cited in the judgment below, but there was such an express contract of tenancy between the mortgagee and the mortgagor and the ordinary rule did not apply, and it is in that case pointed out that unless crops are taken off by the mortgagor before possession of the land is taken by the mortgagee, the mortgagee may claim the crops. If the mortgagee takes possession and sells the land it is clear that the growing crops go to the purchaser: *McDowall v. Phippen*, 1 O. R. 143; *Cameron v. Gibson*, 17 O. R. 233; *Bagnall v. Villar*, 12 Ch. D. 812. The mortgagor, as far as the right to crops is concerned, is

Argument. in much the same position as a lessee with a right to enter and cut crops, and clearly in such case the lessee's rights are subject to the paramount rights of the mortgagee: Fisher's Law of Mortgage, 4th ed., p. 413, and the same rule applies as to fixtures: *Carson v. Simpson*, 25 O. R. 385. The learned Judge cites and relies on *White v. Pulley*, 27 Fed. Rep. 436, but that case proceeds on American authorities and is not in accordance with the English decisions. It turns on a statutory rule of law in the State in question that a mortgage confers no estate in the land but merely gives the mortgagee a lien on the land as security for repayment of the money.

S. A. Jones, for the respondent. The County Court had jurisdiction to entertain this action, for *fructus industriales* are goods and chattels: Taylor on Evidence, Bl. ed., sec. 1,042; Barron on Bills of Sale, 2nd ed., p. 53; *Evans v. Roberts*, 5 B. & C. 829. On the merits the judgment is right. The mortgagor is in the same position as a tenant at will, who clearly is entitled to emblements notwithstanding the termination of the tenancy: *Partridge v. Bere*, 1 D. & R. 272; *Sexton v. Breese*, 135 N. Y. 387; Coote's Law of Mortgage, 4th ed., p. 680. There was severance by deed: *In re Roose*, *Evans v. Williamson*, 17 Ch. D. 696; *West v. Moore*, 8 East 339. *White v. Pulley*, 27 Fed. Rep. 436, is not distinguishable. The plaintiff is entitled to succeed also on equitable grounds. The mortgagees of the real estate got the benefit of the consideration for the chattel mortgage and they have a surplus in their hands realized from the sale of the real estate. The defendants had notice of the plaintiff's claim and were aware of the facts and should not be allowed to obtain a benefit at his expense.

Moss, Q. C., in reply.

April 5th, 1895. HAGARTY, C. J. O.:—

I am unable to agree with the learned Judge's view. Once the purchaser had entered into possession as owner in fee he was entitled to the land and all crops growing

thereon, and the chattel mortgagee had no right as against him to enter and harvest on any contract made with the former owner while the original mortgage was in default.

Judgment.
HAGARTY,
C.J.O.

We may concede for this case that as long as Kalar, the former mortgagor, was in the undisturbed possession of the land, he could make a valid mortgage of growing crops, and the chattel mortgagee could enter and harvest during such undisturbed possession. But when his mortgagee entered into possession or the vendee of such mortgagee, the right under the chattel mortgage could not be enforced.

The law seems very clear. It was fully discussed in *McDowall v. Phippen*, 1 O. R. 143, and *Cameron v. Gibson*, 17 O. R. 233. See also *Robinson v. Fee*, 42 U. C. R. 448; and *Fisher's Law of Mortgage*, 4th ed., secs. 660, 673.

If the implied right under this chattel mortgage to enter and harvest could be enforced against the prior mortgagee of the realty in possession, I do not see how a lease (for say a year) of the twenty-seven acres made by the mortgagor, would not be equally good.

I think as our law stands it is impossible to support the rights here claimed.

The American case relied on differs from ours. In many of the States the law has been altered, and it is declared that mortgages "are liens on land and not titles to it."

In *Sexton v. Breese*, 135 N. Y. 387, it is said: "In this State it must be regarded as settled by the cases that the title of the mortgagor to the land is not changed by the mortgage. It remains as before; while the mortgagee has in the mortgage a security for the mortgagor's debt, which is impressed upon the lands described and incumbers them with the burden of the debt."

It is further said that if the mortgagee go into possession by surrender of the premises from the mortgagor, the legal title or fee still remains in the mortgagor, and that if the mortgagee were thus in possession his rights were subject to the previous disposition made of the growing crop by the owner of the land.

This view of the law may account for the remarks in

Judgment. *White v. Pulley*, 27 Fed. Rep. 436, relied on by the learned Judge. There it was held that the chattel mortgage operated as a legal, though not a physical, severance of the crops, and operated as a sale of the crops, "and in law operated such a severance that they did not pass at the subsequent sale under the mortgage of the realty."

HAGARTY,
C.J.O.

I do not think this is in accordance with the law by which we are governed.

I think that the appeal must be allowed and the plaintiff's action dismissed.

OSLER, J. A. :—

This case must be determined upon the law relating to mortgagor and mortgagee, not to that of landlord and tenant, and it appears to me to be reasonably clear that the appeal must succeed.

In *Moss v. Gallimore*, 1 Sm. L. C., 9th ed., at p. 629, Lord Mansfield said : " A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent." In *Fisher v. Giles*, 5 Bing. 421, Best, C. J., commenting on this, said (p. 426) : " The payment of rent countenances a right to the possession of the land ; the payment of interest does not ; it relates to the debt, and not to the property pledged. A landlord is not, by taking rent, to induce a man to sow the land, and then turn him out before he can take the crop ; and, therefore, a tenant at will has emblements or may take the crop for his own use : Co. Lit. 55b. Lord Mansfield says, in *Keech v. Hall*, Doug. 21, ' A mortgagor is not entitled to reap the crop, as other tenants at will are, because all is liable to the debt.' A mortgagor resembles a person who has executed a statute or recognizance. Whatever these persons do to give value to the property under pledge is done for the benefit of the creditor" : citing *Bardens and Withington's Case*, 2 Leonard 54.

So in Powell on Mortgages, vol. 1, p. 157 (n.), it is said : " A mortgagor differs from a tenant at will in many re-

spects. He is to pay interest, not rent. He is not entitled to notice to quit nor to emblements, the crop as well as the land being held as security for the debt."

Judgment.

OSTLER,
J.A.

Again, at p. 161 (n.): "When it is said that as between mortgagee and mortgagor, the mortgagee is entitled to emblements, the meaning is, that when the mortgagor has personally occupied the premises, and the actual possession is afterwards delivered to the mortgagee by the sheriff or otherwise; the growing crops which are found upon the premises become part of the security, and may be applied by the mortgagee to his own use; but the principle does not apply to the case where the growing crops have been carried off by the mortgagor, before the mortgagee obtains possession and between the time of his demand and recovery of the possession": *Ex parte Temple*, 1 G. & J. 216.

In *Scobie v. Collins*, [1895] 1 Q. B. 375, Williams, J., points out that a mortgagor in possession is not necessarily more than a tenant on sufferance, and occupation and payment of interest necessarily connected with the mortgage is not necessarily referable to any tenancy other than a tenancy on sufferance.

In *Ex parte Temple*, 1 G. & J. 216, which is relied upon by the learned Judge in his very full and careful judgment, the mortgagor was a tenant at will by express contract, not a mere constructive or *quasi* tenant at will arising out of the relationship of mortgagor and mortgagee, and he was, therefore, entitled to emblements as upon a real tenancy at will. So in the case of *Living v. Ontario Loan and Savings Co.*, 46 U. C. R. 114, which is also cited by the learned Judge, the mortgagees relied upon an unexpired contractual tenancy at will as supporting their right to distrain crops, which had as growing crops been assigned by chattel mortgage by their mortgagors to the plaintiff. The crops had been actually harvested by the mortgagors, who were still in possession of the land, though their right to continue in possession might have been determined by their default in payment of the mortgage: *Gibbs v. Cruikshank*, L. R. 8 C. P. 454, 461, so that the mortgagees' right to

Judgment.

OSLER,
J. A.

distrain had probably been also determined. But the case turns entirely upon this, that the crops had been harvested by the mortgagors, and that the mortgagees, who had not obtained possession of the mortgaged premises, had failed to shew any right to distrain. The head note is inaccurate and misses in great part the real point of the case. See also *Hodgson v. Gascoigne*, 5 B. & Ald. 88; *McDowall v. Phippen*, 1 O. R. 143; *Cullwick v. Swindell*, L. R. 3 Eq. 249; *Bagnall v. Villar*, 12 Ch. D. 812; *Gough v. Wood*, [1894] 1 Q. B. 713.

The principle on which the rights of the mortgagee and mortgagor respectively depend with regard to property of this nature, i.e., growing crops, as laid down in the authorities I have referred to, shews, in my opinion, that one who purchases them from the mortgagor does not stand in a better position than his vendor. The highest position which the mortgagor or the purchaser can take is that there is an implied assent on the part of the mortgagee to the mortgagor sowing the crops or otherwise dealing with them, arising from his remaining in possession after default, and that if he shall still be in possession when the time comes for harvesting them he may do so and if he reaps them before the mortgagee enters, so far as the crops in specie are concerned, they may belong to him or to his vendee. But, in truth, it is neither necessary nor proper to imply any assent where the mortgagor is in as tenant on sufferance and if the mortgagee obtains possession while the crops are still growing he acquires them with the land by title paramount to the mortgagor and his vendee and the latter has no better title to them when ripe than the former. We were referred to some American cases to the contrary, but these, on being examined, appear to depend upon the peculiar law of the State in which they were decided, under which a mortgage confers on the mortgagee no more than a lien upon the land as security for his debt. Cases to the contrary are not wanting in Courts of considerable authority, where the law of mortgagee and mortgagor is, or was when they were decided, substantially the same as

our own. I refer to *Lane v. King*, 8 Wend. 584, the case of a lessee of the mortgagor, subsequent to the mortgage; *Shepard v. Philbrick*, 2 Denio 174, purchaser of growing crops under execution against the mortgagor. The purchaser of the mortgaged premises was, in both cases, held to have the better title. To the same effect is *Crews v. Pendleton*, 1 Leigh 297, 305.

Judgment.

OSLER,
J.A.

It was urged that inasmuch as the plaintiff had received the mortgage as security for the note he had indorsed for the mortgagor, which, or the proceeds of which, had been paid to the mortgagees, the latter could not, by selling it, get the benefit of the crop as well as the note. As to this it is sufficient to say that there is no evidence that the mortgagees had any notice that the crops were intended to be mortgaged to the plaintiff as security for the note and that there is nothing on which he can found any equity against them. His proper course, it might have been supposed, would be to follow the proceeds of the sale in the hands of the mortgagees after payment of their debt. The appeal must be allowed.

MACLENNAN, J. A. :—

The short point in this appeal is whether a mortgagor in possession can confer upon a third person such a title in crops growing on the land as that the latter can claim them against a purchaser, on a sale regularly made under the power of sale in the mortgage, who has obtained his conveyance and has gone into possession of the land as purchaser before the crops have been reaped. The learned Judge of the County Court of Brant has held that he can, and this appeal is by the defendants against that judgment.

The action is for the conversion of twenty-seven acres of fall wheat, and the plaintiff claims under a chattel mortgage, dated the 5th of March, 1894. This mortgage was made by one James Kalar, the owner of the land in actual possession, and who had sowed the crop, but who had, on the 19th of February, 1885, made a mortgage in fee

Judgment. thereof to the Synod of Huron to secure payment of \$3,350
MAOENNAN, and interest, containing a power of entry and sale on
J.A. default of due payment of principal or interest on giving
one month's notice, and in case of three months' default
without any notice whatever. When the chattel mortgage
was made, the land mortgage had been several years over-
due, and the mortgagees were taking steps to enforce the
mortgage by sale. On the 7th of April afterwards, the land
was offered at auction but the attempt to sell was abortive,
and on the 11th of April a contract of sale was made under
the power in the mortgage with the defendant A. E.
Hellyer, for \$4,300. On the 18th of April an action of
ejectment was brought against the mortgagor Kalar, and
judgment for possession was signed against him on the
30th.

The purchaser Hellyer was put in possession by process
under this judgment about the 1st of May, and he received
and registered his conveyance about the 12th of May,
while the crop in question was still growing and unripe.

Now, upon this statement of facts, with great respect to
the learned Judge, I think it is clear that the purchaser
A. E. Hellyer became the absolute owner of the crops as
well as of the land, and the title of the mortgagor, who
had sowed them, as well as of the plaintiff, the chattel
mortgagee, was extinguished, and the right of the latter
was converted into a claim to the surplus, if any, of the
purchase money after satisfaction of the claim of the Synod
for their mortgage debt, interest and costs.

It was decided, and I think rightly decided, in *McDowall*
v. *Phippen*, 1 O. R. 143, that under similar circumstances a
mortgagor who had been turned out of possession after a
sale under the mortgage, had no claim to the growing
crops which he had sowed, and which were still unreaped.
It was admitted by the learned Judge, and also by the
learned counsel for the respondent, that such is the law.
But it was contended that by a sale or mortgage of the
crops while still in possession, the mortgagor could place
his purchaser or mortgagee in a better position and give

him a higher right than his own, because his deed operated as a severance of the crops from the land. That argument, however, is clearly fallacious, for the severance which is effected is not a severance in fact, but a severance in law merely, and operates only as between the mortgagor and his grantee. As against the mortgagee of the land the rights remain as before. The subsequent grantee's rights stand as high as, but no higher, than those of the mortgagor, and unless the crops are reaped before the mortgagee enters, the rights of both mortgagor and his grantee are extinguished. In the case in bankruptcy of *Ex parte Temple*, 1 G. & J. 216, relied on by the learned Judge, the mortgagee had, by the express terms of the mortgage, made the mortgagor a tenant at a rent reserved and had never entered, and so far as it is applicable it is an authority against the respondent's contention. It would be a strange state of the law if a mortgagor could convey to another rights and interests which he himself did not possess.

Judgment.
MACLENNAN,
J.A.

The appeal must therefore be allowed, and the action must be dismissed.

Appeal allowed with costs.

SHERK v. EVANS.

County Court—Jurisdiction—Removal of Action—54 Vict. ch. 14 (O.)—Court of Appeal—Practice—Certificate of Judgment—Summary Order for Repayment of Money.

An action cannot be removed under 54 Vict. ch. 14 (O.) from a County Court to the High Court after verdict or judgment in the County Court in favour of the plaintiff, leaving that verdict or judgment in force, with the right to either party to move against it in the High Court.

Re McKay v. Martin, 21 O. R. 104, considered.

Judgment of the County Court of Haldimand reversed.

Where the certificate of judgment of the Court of Appeal by inadvertence directed the dismissal of a County Court action with costs, instead of merely setting aside the judgment in the County Court for want of jurisdiction, the certificate was on summary application amended and repayment of costs taxed and paid under it directed.

Statement. THIS was an appeal by the defendants from the judgment of the County Court of Haldimand.

The action was brought to recover a sum exceeding \$200, alleged to be due by the defendants to the plaintiff for seeds purchased by him on their behalf, and for disbursements made by him in connection with the purchase and cleaning of the seeds. The defendants before the trial objected to the jurisdiction of the Court, and when the action came on for trial before his Honour Judge McMillan on the 13th of December, 1893, the objection was insisted upon and certain items of the claim were struck out. The trial of the action was then proceeded with and a verdict was given by the jury in favour of the plaintiff for \$199.81, and judgment was entered for that amount. Upon appeal to the Court of Appeal for Ontario this judgment was, on the 30th of June, 1894, set aside on the ground of want of jurisdiction, but by inadvertence the certificate of judgment stated in general terms that the appeal was allowed with costs, and that the action was dismissed with costs. The costs in the Court below were taxed, and on the 28th of July, 1894, execution therefor was issued out of the County Court and was handed to the sheriff, to whom, after protest, the costs and sheriff's fees were paid by the plaintiff. Subsequently, upon application to the Court of Appeal, the

certificate of judgment in that Court was amended so as to limit it to setting aside, for want of jurisdiction, the judgment entered in the County Court, and on the 17th of October, 1894, the plaintiff moved, before his Honour Judge McMillan, for an order setting aside the judgment of dismissal entered by the defendants in the County Court and for an order for the repayment of the costs in the County Court paid by the plaintiff, and for an order transferring the action to the High Court of Justice. On the 11th of January, 1895, judgment was given setting aside the judgment, ordering repayment of the costs, and transferring the action to the Queen's Bench Division of the High Court of Justice. Upon the latter point the order contained the following provisions:

"It is further ordered that this action be transferred from this Court to the Queen's Bench Division of the High Court of Justice, the condition of the action being that judgment has been entered in the County Court of the county of Haldimand in favour of the plaintiff for \$199.81 with full costs of suit, which said judgment on appeal to the Court of Appeal was set aside on the ground that the claim as sued was beyond the jurisdiction of the County Court.

And it is further ordered that liberty be given to both or either of the parties hereto to move against the judgment at the next regular Sittings of the Queen's Bench Division of the High Court of Justice.

And it is further ordered that the costs of this order and all other costs over which I have power in the above-styled cause be payable by the party or parties eventually unsuccessful to the successful party or parties."

The defendants appealed from this order and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 6th of March, 1895.

W. F. Walker, Q. C., for the appellants. The learned Judge in the Court below had no power to transfer this

Argument. action to the High Court of Justice, leaving the verdict and judgment in force. To hold that he could do so would really be to hold that all actions might be tried in the County Court, and that then the parties would simply be left to the right of appeal to the High Court. The County Court, it has been held, had no jurisdiction to try this action, and therefore the proceedings in, and verdict and judgment of, that Court were void. All that can be done is to transfer the action to the High Court leaving the parties to proceed *de novo* in that Court. Nor had the learned Judge any power summarily to order the repayment by the defendants to the plaintiff of the costs. The right to repayment is a question that should be tried in an action.

C. W. Colter, and Geo. Kappeler, for the respondent. There was power to make the order in question: *Re McKay v. Martin*, 21 O. R. 104. Adding terms does not harm the appellants, for these terms may be disregarded by the High Court. The Act for the removal of cases from a County Court to the High Court is not limited to pending actions, and it is reasonable to allow a transfer after judgment in order to avoid expense. It is as a rule only after judgment that it can be seen whether there is or is not jurisdiction. The order for repayment of the costs was quite distinct from the order for transfer and was properly made. Enforcing payment of costs was an abuse of the process of the Court and repayment was properly directed: *Rodger v. Comptoir D'Escompte de Paris*, L. R. 3 P. C. 465.

W. F. Walker, Q. C., in reply.

April 5th, 1895. OSLER, J. A. :—

When this case was before us on a former occasion we held that the County Court had no jurisdiction, the action being for an unliquidated demand of more than \$200. The objection to the jurisdiction was pressed at the trial, but was overruled, and the plaintiff had a verdict and

judgment. The certificate of the judgment of this Court allowing the appeal with costs and setting aside the judgment below was erroneously drawn up and issued by the appellants dismissing the action with costs as well, and the defendants, on the 19th of July, 1894, signed judgment in the County Court for such costs on our order and issued execution therefor, and levied them from the plaintiff. It is hardly necessary to say that this was an entirely wrong proceeding, because this Court in allowing an appeal from the County Court on the ground of want of jurisdiction in that Court never pronounces judgment dismissing the action there. It sets aside the erroneous proceedings, viz., the trial and judgment, and leaves the case where it was before the Judge undertook to try it: *Powley v. Whitehead*, 16 U. C. R. 589.

Judgment.

OSLER,
J.A.

Consol. Rule 1256, taken from the Ontario Judicature Act, 44 Vict. ch. 5 (O.), Rule 489, now appears to give the County Judge jurisdiction in that event over the costs of the action, and to order by and to whom the same shall be paid, and enables the Court to enforce payment by the same remedies as in cases within the proper competence of the Court. This Court had no jurisdiction over those costs, and meant to leave them to the Court below. After these had been paid pursuant to the judgment entered up under the certificate of this Court of the 30th of June, 1894, erroneously issued, as I have said, the plaintiff moved to vary the certificate, and it was varied by declaring that the appeal had been allowed for want of jurisdiction, and by striking out that clause of it which purported to dismiss the action, which, being done, the plaintiff carried the amended certificate into the County Court and obtained an order from the Judge setting aside the judgment and the execution issued thereon, and ordering repayment of the costs which had been levied thereunder and interest thereon and sheriff's fees. The Judge further ordered that the action should be transferred from the County Court to the High Court of Justice, Queen's Bench Division.

Judgment.

OSLER,
J.A.

Against this order the present appeal is brought, the contention of the defendants being that the County Court Judge had no jurisdiction either to order the repayment of the costs paid under the judgment of the 19th July, signed on the certificate of this Court erroneously issued, or to transfer the action to the Queen's Bench Division after verdict or with the verdict not set aside, and to give leave to move there against the judgment, the latter having been in fact set aside by the order of this Court on the 30th of June, 1894.

It is impossible, in my opinion, to support these extraordinary proceedings of the County Court. When upon the former appeal to this Court the appeal was allowed and the judgment set aside, the verdict on which it was founded, having been equally without jurisdiction, fell with it, and the order of this Court should have been, and doubtless would have been, so framed as to expressly set it aside as well as the judgment when the motion to amend the order was made, had there been any suggestion that the verdict was considered, or intended to be made use of, as an existing proceeding. The order to amend the certificate was directed to the error complained of, viz., the dismissal of the action, and to shew that the appeal had been allowed on the ground of the absence of jurisdiction only, so that the plaintiff might not be embarrassed, as it was suggested he would be, in case he should think fit to bring a new action in the High Court. What we must do now is to amend the certificate so that it may express fully and in terms the judgment of the Court on the first appeal, and shew that the verdict as well as the judgment of the County Court was set aside, and, that being done, the order of the County Court purporting to transfer the cause to the Queen's Bench in the condition of having an existing verdict must be set aside also. On that assumption the order was an erroneous one, as the recent Act, 54 Vict. ch 14 (O.), does not, in my opinion, authorize the transfer of an action after verdict for the purpose of having judgment. It might as well be contended that it warranted a

transfer after judgment for the purpose of execution. The intention of the Act was to enlarge the scope of section 23 of the County Courts Act, R. S. O. ch. 47, which enabled a *certiorari* to be issued where the jurisdiction of the County Court was ousted in certain specified cases, of which the present is not one. Prior to that enactment a *certiorari* could not be granted when the County Court had no jurisdiction: *O'Brien v. Welsh*, 28 U. C. R. 394; and this continued to be the law in all cases not covered by section 23. Then the Act 54 Vict. ch. 14 (O.), extended the same relief in all actions "where the County Court had not cognizance thereof from any cause," and enabled the action to be transferred by a judge's order instead of by *certiorari*.

Judgment.

O'SHEA,
J.A.

The proceedings thenceforward are to be, as the Act declares, as provided by sections 23, 25 and 38 of the County Courts Act. Turning to those sections, it is very evident that the removal is intended to be for the purpose of the trial of the cause, providing, as they do expressly, that the statement of claim or pleadings in the County Court shall stand, and that new ones shall not be necessary in the High Court. *Certiorari* was never awarded after verdict unless it had been set aside in the inferior Court, nor in general after judgment except for the purpose of execution: *Black v. Wesley*, 8 U. C. L. J. 277; *Gallagher v. Bathie*, 2 C. L. J. 73; *Help v. Lucas*, 8 U. C. L. J. 184; and in cases where it did lie, the pleadings were commenced *de novo* in the superior Court. The new legislation was intended to dispense with this, but not to make the latter Court a mere register of a trial and judgment had in and awarded by a Court which had no jurisdiction. For these reasons I am unable to agree with the case of *Re McKay v. Martin*, 21 O. R. 104, if any inference is to be drawn from what was there ordered by the Queen's Bench Division opposed to the view I have above expressed.

Then as to the costs which the defendants have wrongfully received or recovered under our order as originally drawn up. Whatever may be the right of the County Court to order summary repayment of moneys recovered

Judgment.

OSLER,
J.A.

on a judgment irregularly or wrongly signed in a case within its jurisdiction, I think there can be no doubt that it can not do so in an action where it has no jurisdiction, which is the case here. How is the order to be enforced? Are executions to be issued and goods, and perhaps lands, to be sold thereunder? That cannot be. But the plaintiff is not without remedy, and that not necessarily by action. The error was that of this Court, and this Court, being a superior Court, can afford a remedy by ordering that the moneys thus wrongfully recovered under its erroneous order shall be repaid to the party: *Moore v. Vestry of Fulham*, [1895] 1 Q. B. at p. 403. Such an order we accordingly make, and the certificate being amended in the manner I have already specified, the cause remains in the Court below, with the verdict and judgment set aside, and the County Judge is free to act as he may see proper under the statute 54 Vict. ch. 14 (O.), by ordering the action to be transferred "to the High Court." It may be well to note for his guidance that the Act confers upon him no power to give any directions to that Court or to say how the costs shall, in case of transfer, be dealt with. In these respects the order of transfer which we set aside was also improper.

I think there should be no costs of the appeal, both parties having been in fault.

MACLENNAN, J. A. :—

It may be doubtful whether the learned County Court Judge had jurisdiction to order restitution of the money levied under the process of the Court in an action beyond its jurisdiction. When the process was enforced it had the apparent support of a judgment of this Court, and although the money was levied under County Court executions, the *origo mali* was the erroneous certificate of the Court of Appeal. Whether, therefore, the County Court Judge could lawfully order restitution of money levied under the void process of the County Court, there can be no doubt of the power of this Court to do so: Judicature Act, R. S. O. ch. 44, secs. 47, 50. Mr. Walker,

in his argument before us, did not contend that the defendants ought not to pay back the money, but he contended that the only way the plaintiff could recover it was by action. I do not think so. I think it is clear that the money having been recovered from the plaintiff in consequence of an erroneous certificate of this Court, it is within the power, and it is also the duty, of this Court to see that prompt restitution is made. Therefore, unless the defendants repay the money paid by the plaintiff to the sheriff, with interest as mentioned in the order complained of, an execution ought to be awarded out of this Court to the plaintiff to recover the amount.

Judgment.

MACLENNAN,
J.A.

With regard to the other part of the order, what the Court intended in its former judgment was not to set aside the judgment and to leave the verdict to stand, but to set both aside. We do not think that the Legislature intended by the amending Act of 1891, to authorize the transfer of an action after trial or judgment, leaving the verdict or judgment to stand, but to transfer it so that it might be tried in the High Court. Reading the amending Act and the clauses of the County Courts Act referred to therein, and also section 24, together, it is quite apparent that the transfer intended is for the purpose of trial, and that if a trial has been had in the County Court that was not intended to stand. I think, therefore, the order of the learned County Court Judge, so far as it assumes to transfer the action as one in which a verdict has been had, and with liberty to the parties to move against it in the High Court, is erroneous. I think what ought to be done is to amend the certificate of our former judgment so as to set aside both the verdict of the jury and the judgment thereon; also to set aside the order complained of altogether, and to leave it to the plaintiff or defendants to apply for a transfer of this action if they think fit. If the action is not transferred the learned Judge has power under Rule 1256 over the costs of the action incurred prior to the trial; but if a transfer is made it seems not to have been contemplated by the Legislature that he should have any

Judgment. such power, for the proceedings in the County Court may be utilized in the High Court, and the costs thereof will
MACLENNAN, J.A. therefore be within the disposing power of the Judge of the High Court.

I think there should be no costs of this appeal.

HAGARTY, C. J. O.:—

I am of the same opinion.

Appeal allowed without costs.

TRUMAN V. RUDOLPH.

*Master and Servant—Workmen's Compensation for Injuries Act, 1892—
Master's Knowledge of Defect—55 Vict. ch. 30, sec. 6, sub-sec. 3 (O.).*

Where the workman is aware that the employer knows of the defect that ultimately causes the injury he is not bound under sub-section 3 of section 6 of the Workmen's Compensation for Injuries Act, 1892 [55 Vict. ch. 30 (O.)], to give information thereof to the employer, and his failure to give information in other cases will not bar his right of action if a reasonable excuse is shewn for the omission, this being a question of fact for the jury.

Where both the employer and the workman know of the defect and it is the workman's own duty to see that the defect is remedied but orders given by him with that object are not carried out, he cannot recover. Judgment of the Common Pleas Division affirmed.

Statement. THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division.

The plaintiff was head brewer in the employment of Rudolph & Begg, who carried on a brewery at the city of St. Thomas. In the brewery was a large cooler into which the beer was poured to be cooled while in process of manufacture, and it was necessary for the plaintiff to go to this cooler from time to time to inspect the liquid. The cooler was a large vat standing on supports about 14 feet from the floor, and to look into it it was necessary to climb a ladder resting against the side of the vat. This

ladder was not fastened to the vat or to the floor, but at the foot were iron spikes to keep it from slipping. These spikes had, however, from long use, become very much worn and were no longer sufficient to keep the ladder from slipping. The plaintiff was aware of this defect and the defendants were also aware of it, and a few days before the accident in question happened the plaintiff ordered one of the men to put new spikes in the foot of the ladder. These orders were, however, not carried out, and a few days afterwards when the plaintiff was using the ladder it slipped and he fell and was very severely injured. He then brought this action, which was tried at St. Thomas on the 8th of March, 1894, before MEREDITH, J., and a jury. The plaintiff closed his case without giving any evidence that the defendants were aware of the defect in the ladder and a nonsuit was moved for and granted on this ground. This judgment of nonsuit was affirmed by the Common Pleas Division. On the plaintiff's examination for discovery, taken several weeks before the trial, he had stated that the defendants were aware of the defect.

The plaintiff appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 1st of October, 1894, and 16th of January, 1895.

N. Macdonald, for the appellant. The judgment of nonsuit was wrong. It is clear that the defendants knew of the defect in question, and that being the case it was not necessary for the plaintiff to give any evidence that they knew of it, but if the evidence was necessary, the plaintiff should have been allowed, even after the motion for nonsuit was made, to give it, for the statement had already been sworn to by him in his examination for discovery taken weeks before the day of the trial. The plaintiff, moreover, proved that he had a reasonable excuse for not giving notice of the defect, and the question of reasonable excuse should have been left to the jury.

Argument. *F. E. Hodgins*, and *J. S. Robertson*, for the respondents. The section of the Act is imperative, and in the absence of evidence of knowledge of the defect by the employers the workman cannot recover. Proof of knowledge is an essential part of the plaintiff's case, and knowledge not having been proved here the plaintiff was properly nonsuited. On the facts, too, apart from this legal objection, the plaintiff was properly nonsuited, for the evidence shews that the accident was the result of his own neglect in omitting to see that the ladder in question was in proper repair.

N. Macdonald, in reply.

April 5th, 1895. The judgment of the Court was delivered by

OSLER, J. A. :—

That the injury sustained by the unfortunate plaintiff was caused by reason of a defect in the condition or arrangement of the plant used in the business of the defendants within the meaning of section 3, sub-section 1 of the Workmen's Compensation for Injuries Act, 1892, hardly admits of a question. The ladder which fell under the plaintiff was used in a dangerous position, was extremely likely to fall, and there was nothing to prevent it from slipping. It appeared that the plaintiff knew of the defect and that the defendants also knew of it, but the plaintiff's case was closed without his having actually testified at the trial that he was aware at and before the time of the accident that his employers already knew of the defect. He was not allowed to be recalled as to this, although it appears to have been pointed out to the learned trial Judge that he had already in his examination before trial made the statement in question, so that the danger of patching up a case by making good some error first indicated at the trial on the motion for nonsuit did not exist.

The plaintiff was accordingly nonsuited, it being held

that he came within section 6, sub-section 3, of the Act of 1892, [55 Vict. ch. 30 (O.)] having failed to give information of the defect to his employers. If the case turned upon the question whether that section was properly construed at the trial, I am not prepared to say that I should agree with the decision. It seems to me not to give due effect to the words "without reasonable excuse," which are in the section of our Act though not in the corresponding section of the English Act. The workman is not entitled to compensation under the Act in any case where he knew of the defect or negligence which caused his injury and failed without reasonable excuse to give information thereof within a reasonable time to his employer.

Judgment.

OSLER,
J.A.

If a reasonable excuse exists, and whether it does or not is for the jury upon the evidence, an action lies. Then the section proceeds, "unless he was aware that the employer already knew of the defect or negligence." That is an absolute excuse for the omission to give information to the employer. Our Act contemplates, as it seems to me, that there may be some other excuse for the omission, than the knowledge that the master is already aware of it.

I am of opinion, however, that section 6, sub-section 1, meets the plaintiff's case, and on the facts proved shews that he cannot recover. It enacts that the workman shall not be entitled to any right of compensation under section 3, sub-section 1, unless the defect, etc., arose from or had not been discovered or remedied owing to negligence of the employer or of some person entrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery, plant, etc., are proper.

The plaintiff said that he was the head brewer, or filled the position of head brewer, at the defendants' brewery, and that he had, sometime before the occurrence of the accident, noticed the defective and dangerous condition of the ladder, and had given orders to one Franks, an assistant brewer, to make it safe—to have it fixed right away. His misfortune arose from not noticing when he next had

Judgment. occasion to use the ladder that his orders had not been
OSLER, complied with. From the evidence I extract the following
J.A. passages:

[The learned Judge read an extract and continued:]

The defective condition of the ladder was owing, as this evidence shews, to the unfortunate plaintiff's own neglect, not in the sense of contributory negligence, but neglect in not seeing that the ladder was put in a properly secure condition. He was the person whose duty it was to see that this was done, and his own neglect was what led to his injury.

I think we can only affirm the judgment.

Appeal dismissed with costs.

WELCH V. ELLIS.

Company—Director—Personal Liability for Wages—“Labourers, Servants and Apprentices”—R. S. O. ch. 157, sec. 68.

A person employed as foreman of works, who hires and dismisses men, makes out pay-rolls, receives and pays out money for wages, and does no manual labour, and in addition to receiving pay for his own services at the rate of \$5 a day, payable fortnightly, is paid for the use of machinery belonging to him and of horses hired by him, is not a labourer, servant or apprentice within the meaning of section 68 of the Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, and cannot recover against the directors personally.

Judgment of the County Court of Brant affirmed.

THIS was an appeal by the plaintiff from the judgment of the County Court of Brant. Statement.

The action was brought under the provisions of section 68 of the Ontario Joint Stock Companies' Letters Patent Act, R. S. O. ch. 157, against the defendants as directors in the British America Starch Works, an incorporated company, to recover an amount alleged to be due to the plaintiff for wages. He was employed by the company as foreman to superintend the construction of a flume and storage tank at the company's factory, the agreement being that the company would employ the men necessary for the work and would furnish him every fortnight with money to pay them, and would pay him for his services at the rate of \$5.00 a day, payable fortnightly, and would also pay him \$2.00 a day for the use of a steam pump. The plaintiff hired and dismissed men, fixed their rate of pay, and received and paid out money for their wages, and he did no manual labour himself. When the work was finished the company owed the plaintiff \$350.55, for moneys advanced by him to pay the men employed, charges for his own services and for the use of the pump and of some horses hired by him, and the price of materials furnished. He brought an action against them claiming payment of this sum and after the commencement of the action they paid to him \$125.00 on account, reducing his claim to \$225.55, for which amount he recovered judgment by default. Execu-

Statement. tion was issued under this judgment and was returned *nulla bona*, and this action was then brought and was tried before his Honour Judge S. J. Jones, at Brantford, on the 11th of December, 1894. On the 29th of December, 1894, judgment was delivered in favour of the defendants, the learned Judge holding that the plaintiff was not a labourer, servant or apprentice within the meaning of the section in question.

The plaintiff's appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 6th of March, 1895.

W. S. Brewster, and *D. Plewes*, for the appellant *Ingram v. Barnes*, 7 E. & B. 115, is relied on by the learned Judge but is distinguishable. In that case there was no agreement for personal services. Moreover, the case was decided under the Truck Act and the intention of that Act is quite different from the intention of the Act now in question, and that Act might properly be given a narrow construction. The Act now in question should, on the contrary, receive as wide a construction as possible, as it is passed for the protection of persons not in a position to protect themselves. *Morgan v. London General Omnibus Co.*, 13 Q. B. D. 832, is also relied on, but the Act there in question has an express reference to a person "engaged in manual labour." The intention of section 68 clearly is to benefit all wage earners. The right is not even confined to sums due to wage earners for wages. The section speaks of "debts not exceeding one year's wages," and it is absurd to suppose that day labourers would ever have a claim for one year's wages. The section also speaks of the action being brought "within one year after the debt became due," and these references clearly denote that claimants of a superior class are referred to. The use of the word "apprentice" also throws light on the meaning of the section. There would be no apprentice to a day labourer. Because the plaintiff was foreman of the labourers, he was

none the less himself a labourer. In *Bishop v. Letts*, 1 F. & F. 401, an overseer of artificers was himself held to be an artificer. Whether, however, the plaintiff can be considered a labourer or not is immaterial, for clearly he is a servant, which is as wide a term as can be used to define a person employed by another. In *Ex parte Neal*, Mont. & McA. 194, a commercial traveller was held to be a servant, and in *Ex parte Homborg*, 2 M. D. & DeG. 642, the mate of a ship was held to be a servant. See also *Ex parte Humphreys*, 3 D. & C. 114; *Whiteley v. Armitage*, 13 W. R. 144; *Ex parte Gordon*, 3 W. R. 568. *Gordon v. Jennings*, 9 Q. B. D. 45, is also relied on but is distinguishable. The word "wages" is used in the Act there in question and the scope of the Act is different.

E. Sweet, and *J. T. Hewitt*, for the respondents. The plaintiff is not a workman or labourer but a contractor, and the case is very like *Riley v. Warden*, 2 Exch. 59, where a contractor was held not to be within the Truck Act even though he might do some work himself. In *Sleeman v. Barrett*, 2 H. & C. 934, it is pointed out that the general nature of the employment must be looked at, and that even doing some work personally is not enough if the general employment is really of a higher grade. In *Hunt v. Great Northern R. W. Co.*, [1891] 1 Q. B. 601, a goods guard, who sometimes assisted in loading and unloading goods, was held not to come within the Truck Act, the distinction there stated being that it was his primary duty to use his intelligence and not his hands, and that distinction is exactly applicable here. Mere incidental manual labour is not enough: *Bound v. Lawrence*, [1892] 1 Q. B. 226. The word "labourer" is clearly used as referring to a person whose substantial occupation it is to do manual work. The term "servant" standing by itself would possibly include a person in the plaintiff's position, but here its meaning is restricted by the words with which it is used. The maxim *noscitur a sociis* applies: Maxwell on the Interpretation of Statutes, 2nd ed., p. 398. *Gordon v. Jennings*, 9 Q. B. D. 45, has not been distinguished.

Argument. There the amount of remuneration was referred to as a test, and the remuneration of the plaintiff in this case is much larger than the remuneration of the defendant in that action. Moreover, here the plaintiff was making a profit out of articles and materials furnished by him, so that there is no doubt that he was really a contractor. Even if the plaintiff is a labourer or servant within the meaning of section 68, he is not entitled to recover in this action, for the action in which judgment was recovered was brought on an account stated, and many other items besides the claim for wages were included, so that the Act has not been complied with: *Witherhead v. Allen*, 42 N. Y. 562. Taking the account as set out and crediting the payments made the claim for wages would be wiped out: *Simson v. Ingham*, 2 B. & C. 65.

W. S. Brewster, in reply.

April 5th, 1895. OSLER, J. A.:—

I am sorry for the plaintiff who has been treated very badly by the company, but I think that he cannot recover against the directors in this action.

Our enactment would appear to have been borrowed from some of the laws of the State of New York, which provide that the stockholders of the company in the events contemplated, shall be liable for all debts that may be due and owing to their "labourers, servants and apprentices" for services performed for the corporation, and upon the construction of this and similar language it has been held that a person in the position of the plaintiff is not within the class: *Coffin v. Reynolds*, 37 N. Y. 640; *Dean v. De Wolf*, 16 Hun 186; *Bulch v. New York & Oswego R. W. Co.*, 46 N. Y. 521; *Wakefield v. Furgo*, 90 N. Y. 213. This collocation of words as indicating different classes of persons rendering inferior service is a very ancient one. The statute does not say "all servants" or even "the servants" of the company shall have an action, but groups together "labourers, servants and apprentices."

The object evidently was to protect, not the officers and agents and servants of a superior class, but the inferior and less important class. "The services referred to are menial or manual services. He who performs them must be of a class whose members usually look to the reward of a day's labour, or service, for immediate or present support; from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job, under the direction of a superior": *Wakefield v. Fargo*, 90 N. Y. 213.

Judgment.

OSLER,
J. A.

The word "servant," therefore, cannot be taken in its larger sense. Its meaning must be restricted. "Apprentice" has its own meaning and cannot include a master workman. Taking "labourer" on the one side and "apprentice" on the other we are driven to conclude that the word "servant" was not intended to include the higher grades of employment, but is controlled by the word which precedes it. *Noscitur a sociis*, and it would violate this rule to hold that the intermediate or second class represented a higher grade than the class first named.

When two or more words susceptible of analogous meanings are coupled together, *noscuntur a sociis*, they are understood to be read in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general: Maxwell on the Interpretation of Statutes, 2nd ed., p. 398. The servant, we must hold, intended by the Act is one of a humbler character, who does work similar to that required of a labourer, a word which in common parlance imports one who is engaged in manual toil, one who works, chiefly at all events, with his hands and not with his head, and does not properly describe a person occupying the trusted and responsible position of the plaintiff, a contractor's foreman, hiring and discharging such persons as I have described as labourers and receiving and disbursing their wages for and on behalf of his employers.

I do not forget that the plaintiff's remuneration is called

Judgment. Eversley on Domestic Relations, p. 907. But I think the
MACLENNAN, other words used in this Act make it necessary for us to
J.A. restrict the meaning of the word "servant" and to confine
it to persons engaged in manual labour. That is what was
done in *Gordon v. Jennings*, 9 Q. B. D. 45 in a case under
the Wages Attachment Abolition Act in England, where
the words are "wages of a servant, labourer or workman,"
and it was held that the secretary of a company with a
salary of £200 a year was not a servant within the Act.
That conclusion was reached by a consideration of the
object of the Act, and the association in which the word
"servant" was found. So here the object of the enactment
is to give to labourers and apprentices and servants of that
class a guarantee against the loss of their wages in case of
the insolvency of the company by making the directors
sureties for its payment; and it is evident to my mind
that it was not intended to give this suretyship to any
but the humblest class of wage earners, the loss
of whose wages might be productive of great distress to
themselves and their families. The difference between
the language used in this Act and in the Act respecting
wages is quite remarkable. In the latter Act the words
used are: "The wages or salary of all persons in the
employment of the execution debtor," or of "the com-
pany." But this Act merely gives the persons employed
priority over other creditors in the distribution of the
assets of their common debtor, while the other casts the
burden of suretyship upon persons not otherwise liable; in
fact imposes upon the directors a penal liability for the
default of the company, though they may have been guilty
of no wrong whatever: see Maxwell on the Interpretation
of Statutes, 2nd ed., p. 398; *Ingram v. Barnes*, 7 E. & B.
115; *Bound v. Lawrence*, [1892] 1 Q. B. 226; *Morgan v.*
London General Omnibus Co., 13 Q. B. D. 832.

HAGARTY, C. J. O.:—

I agree.

Appeal dismissed with costs.

ZUMSTEIN V. SHRUMM.

Action—Negligence—Damages—Highways—Turkey.

The owner of a turkeycock which without negligence strays upon the highway contrary to a by-law of the municipality is not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkeycocks usually do.
Judgment of the County Court of Lincoln affirmed.

THIS was an appeal by the plaintiffs from the judgment of the County Court of Lincoln. Statement.

The action was brought by a farmer and his wife to recover damages for injuries sustained under the circumstances thus stated in the amended statement of claim:—

“On or about the 15th day of June, 1893, the female plaintiff was lawfully driving a horse and buggy owned by the male plaintiff along one of the public highways in the township of Gainsborough, upon which highway the defendant unlawfully and negligently and in breach of his duty in that respect allowed a certain noisy and troublesome turkey gobbler owned and kept by him, and which turkey gobbler was in the habit of acting in a manner that was likely to frighten horses, to run at large, well knowing that the said turkey was in the habit of acting in a manner that was likely to frighten horses which might be properly driven along the said highway, and upon the said female plaintiff with the said horse and buggy arriving at the place on the said highway where the said turkey then was, the said turkey by sudden noise and movements frightened the said horse so that the said female plaintiff could not control him, and caused the said horse to run away and upset the said buggy and the said plaintiff was thrown violently out upon the road and sustained a fracture of her collar-bone and other serious injuries, and the buggy and harness of the male plaintiff were also damaged.”

The defendant demurred to the statement of claim as originally framed and the demurrer was allowed by his Honour Judge Senkler, leave being given to the plaintiffs

Statement. to amend, and they then, in accordance with the views expressed by him, framed their claim as above set out.

The action was tried at St. Catharines on the 12th of June, 1894, before his Honour Judge Senkler and a jury. It was proved that the horse was a quiet one and a number of witnesses were examined, some of whom stated that they had known turkeys to frighten horses, while others stated that they had never known such a thing to occur. It was also shewn that it was customary to allow turkeys to run at large although there was a by-law in force in the township of Gainsborough prohibiting people from allowing cattle and poultry to run at large on highways. There was no evidence that the defendant had ever been warned that the turkey in question was dangerous or likely to frighten a horse, nor was there any evidence of any special carelessness in the way in which he kept it.

Questions were submitted to the jury and these questions and their answers thereto were as follows:—

Was the plaintiff's horse frightened and caused to run away by the turkey gobbler of the defendant? Yes.

Was the turkey gobbler in the road at the time of the occurrence? Yes.

Was the defendant's turkey gobbler in the habit of acting in a manner likely to frighten ordinary horses when travelling along the road, it being understood that there was nothing peculiar in this turkey to distinguish it in this respect from other turkeys, and was the turkey so acting at the time of the occurrence? Yes, but no habit different from any other turkey gobbler.

Was the accident occasioned by any unusual timidity or wildness of the plaintiff's horse? No.

Are farmers in Gainsborough in the habit of allowing their turkey gobblers to run at large? Yes, but it may be against the law.

If the jury find for the plaintiffs, then how much do they award? To the husband, \$50.00; to the wife, \$25.00.

Judgment was reserved and on the 2nd of January, 1895, was given in favour of the defendant.

The plaintiffs' appeal was argued before HAGARTY, Argument.
C. J. O., OSLER, and MACLENNAN, JJ.A., on the 11th of
March, 1895.

Moss, Q. C., and E. A. Lancaster, for the appellants. That there is a right of action in a case of this kind has been determined by his Honour Judge Senkler, in disposing of the demurrer, and that judgment not having appealed from is conclusive. The findings of the jury fully support the allegations in the amended statement of claim and upon those findings judgment should have been entered in favour of the plaintiffs. The defendant has disobeyed the by-law and has been guilty of a negligent act likely to cause injury, and in fact resulting in the present instance in injury to the plaintiffs: *Jewett v. Gage*, 55 Me. 538; *Harris v. Mobbs*, 3 Exch. D. 268.

H. H. Collier, for the respondent. A right of action for an injury caused by an animal arises only (a) where the animal has acted in such a manner as to be an obstruction to the highway; or (b) where it has caused damage while trespassing on private grounds; or (c) where it is an animal of a species recognized as dangerous or ferocious and has been allowed to escape from custody; or (d) where, though not of such a species it is to the knowledge of the owner in fact dangerous and ferocious. The plaintiffs have not made out a case under any one of these heads and if judgment is given in their favour in this action it will be in effect holding that merely allowing a turkey to wander at all on the highway is an actionable wrong. The same accident might have happened if a bird had flown from the defendant's orchard across the road, or if a piece of paper had been blown out of his yard into the road. The breach of the by-law creates no liability in favour of the plaintiffs: *Gorris v. Scott*, L. R. 9 Exch. 125; *McKenzie v. Campbell*, 1 U. C. R., at p. 250; *Cox v. Burbidge*, 13 C. B. N. S. 430.

Moss, Q. C., in reply.

Judgment. April 5th, 1895. The judgment of the Court was
HAGARTY, delivered by
C.J.O.

HAGARTY, C. J. O. :—

It seems to me that it was impossible to enter judgment for the plaintiffs on such findings as these. There is no finding of any negligence on the defendant's part leading to the accident, and no knowledge by him of any dangerous character or habit of this bird.

The finding of the jury is that the farmers in that township are in the habit of letting their turkeys run at large.

This refers, I presume, to the by-law. Those who violate its provisions may render themselves liable to the penalties which it imposes, and the "poultry" therein mentioned may be impounded with the horses, cows, pigs, etc., etc., but I do see how it can help the plaintiffs to recover.

The general law as to animals who are allowed to stray from the owner's premises on to a highway or into the premises of another is very fully stated in such cases as *Cox v. Burbidge*, 13 C. B. N. S. 430, and in Lord Blackburn's elaborate judgment (referring to the latter case) in the well-known *Fletcher v. Rylands*, L. R. 1 Exch. 265.

It is difficult to apply the general doctrine so clearly expressed to such a case as this. A domestic fowl, able and accustomed to fly over ordinary fences or gates, walks on the road, strutting and gobbling, as it is called; an otherwise steady horse chooses to be alarmed by this, bolts and causes serious injury. There was no tangible obstruction of the highway such as has been noted in some of the cases cited of an ox or horse lying on the track, or a waggon left in the track, when the owner might be said to have caused the obstruction just as if he had dug a hole or trench in the highway. It seems to be of the character of a horse shying at a sheet of white paper blown by the wind from the defendant's premises to the track, or to a fowl of any kind sitting on the track and suddenly rising on the approach of a vehicle under the horse's nose and thus

frightening him ; a bird as large as a turkey flying low across the road, or a child suddenly blowing a shrill tin trumpet close to the horse, or a cow lowing, or a donkey braying, etc., etc.

Judgment.
HAGARTY,
C.J.O.

Many such suggestions may be made as to the unexpected causes that may frighten more or less sensitive horses.

I may refer to the remarks of the judges in *Rounds v. Stratford*, 26 C. P. 11, on the general subject of objects frightening horses on roads, and to some American authorities on the subject there noticed.

Lord Blackburn says in *Fletcher v. Rylands* L. R. 1 Exch. 265, at p. 286 : "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk ; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger."

However serious the injury was to the plaintiff and his wife, I cannot help thinking that the risk, such as of a horse taking fright from the cause here, must be one of those unforeseen accidents which travellers along a public road must take upon themselves.

As already said, I see no evidence from which negligence on the defendant's part can be proved or presumed or any knowledge possessed by him of the possibility of his turkey cock acting so as to frighten horses.

I am most reluctant to add another to the long list of accidents for which damages are recoverable in such a case as this, arising from circumstances which never could naturally be contemplated as likely ever to occur.

Appeal dismissed with costs.

FOWELL V. CHOWN.

Patent of Invention—Combination—Novelty.

Statement. THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 25 O. R. 71, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 29th and 30th of November, and 3rd of December, 1894.

Moss, Q.C., Cassels, Q.C., and E. Guss Porter, for the appellant.

Osler, Q.C., and Clute, Q.C., for the respondent.

March 5th, 1895. The appeal was dismissed with costs, the Court holding that the article in question was a mere combination of old elements. No opinion was expressed as to the other points dealt with in the judgment below.

COFFEY V. SCANE.

Attachment—Absconding Debtor—Reasonable and Probable Cause.

Where a man, having numerous creditors in Ontario, leaves the Province openly to reside in the United States after publicly announcing his intention so to do, without paying his creditors, and after his departure it is found that statements made by him as to property available to pay his debts are false and that nothing is in fact available for that purpose, his arrest upon civil process upon his return to Ontario for a temporary purpose, intending to return to the United States, is justifiable. Judgment of the Queen's Bench Division, 25 O. R. 22, affirmed.

THIS was an appeal by the plaintiff from the judgment Statement. of the Queen's Bench Division, reported 25 O. R. 22, where the facts and arguments are stated, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 19th of January, 1895.

M. Wilson, Q. C., and *E. Bell*, for the appellant.

Osler, Q. C., and *M. Houston*, for the respondent.

April 5th, 1895. HAGARTY, C. J. O.:—

The main charge here is that the defendant by false suggestions or by suppression of truth wrongfully obtained or procured a judge's order for the plaintiff's arrest.

The case really seems to have resolved itself into this that the defendant swore that the plaintiff about a year before the application had absconded from Ontario to defraud his creditors.

What we have here to regard is whether the order for arrest was obtained by some false or fraudulent statement.

If the defendant had confined himself to the statement that the plaintiff contracted the debt in Canada, then went to the foreign country largely indebted, and after a year there had returned to Ontario, and satisfied the Judge that he was again immediately about to leave, or information to that effect, I hardly see what tenable objection could be taken to the proceeding; the Judge might well consider that a case was made out to warrant a *capias*.

Judgment.

HAGARTY,
C.J.O.

Again, if the defendant had given a true account of the facts as they appeared at the trial, as to the plaintiff being considerably in debt and publicly departing with a valedictory banquet from his admirers, selling his chattels very publicly, informing the defendant, then his creditor, that he had made arrangements to pay his debts out of the proceeds of property and large quantities of sheep, etc., left in charge of a named person for the purpose; that such statements were untrue; that the debts remained chiefly unpaid and that he had returned for a temporary purpose, and was again about to retire abroad, we may ask whether a judge would not have granted the order?

I do not see how it can be left to a jury or decided as a matter of law by the judge that it was the statement as to "absconding" conveying the idea of a secret or clandestine departure which caused the order to be made. I think this would be rather a bold assertion.

If, therefore, an honest statement of the true facts would have supported the order how can it be said that the alleged misuse of the term "absconded" can legally vitiate the proceeding?

If the whole truth fairly stated would support the order I do not see how the defendant's alleged misdescription of the manner of the actual departure, whether in the darkness of night or in noonday glare, can affect the propriety of the arrest.

It is not his first departure that is in question, it is his last. I cannot hold that I must legally infer that the misstatement as to "absconding" procured the order for arrest.

On the contrary I am equally unprepared to hold that the true facts appearing at the trial shewed the absence of reasonable and probable cause for the defendant's proceeding.

My impression is that if I had tried the case I could not have ruled that the plaintiff had shewn such absence.

In this view I have given the plaintiff the benefit of his

view of the true meaning of the word "abscond." I do not further discuss the propriety of that word as descriptive of the plaintiff's departure, nor do I think it necessary to discuss the numerous decisions on the present law of arrest in this country. I am aware that there has been difference of opinion among the judges on this subject.

I think we may dismiss the appeal.

Judgment.
HAGARTY,
C.J.O.

OSLER, J. A. :—

The facts proved or admitted by the plaintiff as to the circumstances under which he first left this Province—his statements with regard to the Teetzel trust deed, his ownership of a quantity of sheep, and his promise (unfulfilled) to remit money to pay his debts—seem to me fully to justify the defendant's affidavit that he had in the spring of 1891 absconded from the Province with intent to defraud his creditors generally, including the plaintiff in particular. I do not think that in the common law courts—the courts which had cognizance of actions brought under the Act relating to arrest and imprisonment for debt—there was ever any substantial difference of opinion as to what was a sufficient affidavit for the purpose of obtaining a judge's order for arrest. I stated what I understood to be the law in *Robertson v. Coulton*, 9 P. R. 16, referred to and approved in the judgment of the learned Chief Justice of the Queen's Bench, and I see no reason to recede from anything I then said. If the debtor, a resident, was about to withdraw permanently from the jurisdiction, that, unexplained by him, was quite sufficient to warrant his arrest, and hundreds of persons have been arrested on affidavits shewing nothing more; the inference drawn, and justly drawn, being that in so departing and withdrawing his person from the jurisdiction there was the intent to defraud. If he could, on motion for his discharge, shew that he had no such intent, it was open to him to do so, but I am not aware of any case in which it was rebutted merely by the explanation that the debtor was going away

Judgment. in order to better his condition, or that his intention to depart was open and notorious.

OSLER,
J.A.

There was in my opinion neither *suppressio veri* nor *suggestio falsi* in the affidavit on which the Judge was procured to make the order in question in the present case so far as the important facts are concerned. Had they all been set forth at length therein they would have justified the order as they do the inference deposed to that the plaintiff had absconded from Ontario with intent to defraud. The plaintiff came back and was going away again still indebted, having made no provision for payment of his debts. It was a perfectly justifiable inference of fact that the fraudulent intent still continued. There is an erroneous statement, no doubt inadvertently made, as to the time when the promissory note, which forms part of the defendant's claim, was acquired, but there is nothing in law which prohibits a creditor from acquiring a debt to make his claim up to the arrestable amount, as there was in the Insolvent Act with regard to the claim which entitled a creditor to make a demand on his debtor to make an assignment. The defendant was in fact a creditor, and so was the then holder of the note when the plaintiff first left the country, and all the Judge was concerned with when he was asked for the order (as regarded the debt) was to see that the party applying for it was a creditor to the necessary amount. He could not refuse it merely because the debt was made up of several claims acquired from other persons. For the rest, he had to be satisfied that the debtor was about to depart from Ontario and he might then draw the inference of fact that the departure was with intent to defraud the creditor. It appears to me that the learned Judge at the trial should have ruled that there was no want of reasonable and probable cause for making the affidavit for the arrest, and no evidence of any imposition on the Judge who made the order. I think the law would be in a most unfortunate state, if a creditor who caused his debtor to be arrested under such a state of facts as has here been dis-

closed were to be left to the tender mercies of a jury in such an action as the present.

Judgment.

OSLER,
J.A.

I am of opinion that the appeal should be dismissed.

MACLENNAN, J. A. :—

The language of the Act respecting arrest and imprisonment for debt, R. S. O. ch. 67, sec. 1, is that the judge is to be satisfied by facts and circumstances shewn by affidavit, that there is good and probable cause for believing that the debtor "is about to quit Ontario with intent to defraud his creditors generally or the said party or plaintiff in particular," and the question in this appeal depends upon the proper construction of these words. The word "abscond" is not used at all, nor any other words indicating an intention to remove secretly or clandestinely. The intention to quit the country and the intention thereby to defraud a creditor or creditors are the essential things, and if good and probable cause to believe they exist is made out to the satisfaction of the judge it is sufficient. The decisions upon the statute of Elizabeth (ch. 5) against fraudulent conveyances will enable us to see what is sufficient to make out the fraudulent intent. That statute avoids conveyances made with intent to delay, hinder or defraud creditors, and the construction which has uniformly been placed upon the language used has always been that it is not necessary that there should be proof of an actual and express intent to defraud creditors, but it is enough if the facts are such as to shew that the conveyance or settlement would necessarily have that effect: see the cases collected in Kerr on Fraud, 2nd ed., p. 178. So under the present Act the intention to defraud, by the very terms of the Act itself, may be inferred from facts and circumstances, and therefore from the necessary or probable consequences, having regard to all the surrounding circumstances of the removal from the country. I am, however, with great respect unable to concur in the broad statement of the law by the learned Chief Justice in the present case, that

Judgment. the intent to defraud is to be inferred from the mere intention to quit Ontario on the part of a debtor. The
MACLENNAN, reason for his conclusion given by the learned Chief
J.A. Justice does not appear to me to be well founded, for it is only in case of an intention to leave the country with intent to defraud, or of having parted with his property, or having made some secret or fraudulent conveyance thereof to prevent its being taken in execution, that his body is liable to be taken: section 10. In my judgment the mere fact of a debtor intending to leave or having left Ontario is not of itself sufficient to raise the inference of an intention to defraud creditors, but on the contrary other facts and circumstances must be shewn from which that inference may properly be drawn.

Now, in the present case the defendant, by an affidavit made on the 16th March, 1892, satisfied the Judge that it was a proper case for an order for the plaintiff's arrest. The order was made and the arrest followed and it is for that the present action is brought.

In order to succeed the plaintiff must allege and prove that the defendant obtained the order by some deception practised upon the Judge; that he either stated or suggested something that was untrue, or omitted to state something within his knowledge that was material and which would or might have caused the Judge to refuse to grant the order, and also that in applying for the order the defendant acted maliciously and without any reasonable and probable cause for so doing. Unless both malice and want of reasonable and probable cause are established the action fails. The learned Judge before whom the action was tried, held, and directed the jury, that upon the undisputed facts want of reasonable and probable cause was made out, and the case went to the jury and they found malice, and a verdict for the plaintiff. The defendant contends that the ruling of the learned Judge was wrong on the question of reasonable and probable cause, and that he ought to have directed a verdict for the defendant and should have dismissed the action. If that contention is

well founded the question of malice does not arise and the appeal should be dismissed. I am of opinion that the ruling of the learned Judge was wrong.

Judgment.
MACLENNAN,
J. A.

In his charge to the jury he tells them that there was nothing in the evidence justifying the defendant's statement in his affidavit that the plaintiff had absconded with intent to defraud his creditors; that "absconding" meant secretly withdrawing from a country or place for an improper purpose, while it was proved that the plaintiff went away with the utmost publicity and without any secrecy at all, and that the defendant knew he had not absconded, and he adds that the defendant had no reasonable or probable cause for making that statement in his affidavit.

Now, as I have pointed out, there is nothing in the statute indicating that the withdrawal must be secret, in order that it may be fraudulent, and I think with great respect there was ample justification in the circumstances as proved and undisputed at the trial, and within the knowledge of the defendant when he made his affidavit, to justify his application. It is true that the plaintiff went away in the most public manner and with the full knowledge of the defendant, and went, as was also well known, for the purpose of residing abroad. He owed a good many people, however, including the plaintiff, debts which he was unable to pay, and the plaintiff looked upon his intended departure with some concern, and applied to him for payment. The following passage from the plaintiff's evidence at the trial shews what then took place :

"There are two or three points in your examination put more clearly than you put them now. Speaking of what you said to Mr. Scane as to Teetzel's house, would this be the proper way of putting it: 'I told him that I left my house and lot with Mr. Teetzel; he would collect the rent, \$7.00 a month; and pay it as far as it went to my creditors and I would send him money to pay my creditors, and I would send money as fast as I could and I thought we parted good friends, and I have not paid

Judgment. him:’ Would that be true? Yes, I guess that is about
MAOLENNAN, right.

J.A.

‘I told Scane I left sheep; I left I do not know how many. They belonged to my first wife. I told him I had sheep. How we came to speak about the sheep, I said he need not be scared about my running away as I had about a thousand sheep, and I would have to come back to look after them. I said I had a lot of sheep and would have to come back to look after them.’ Is that what you said to Mr. Scane? Which?

‘I said he need not be scared about my running away as I had about a thousand sheep, and I would have to come back and look after them.’ Then I see that you said: ‘Would it be correct that you made about \$3,700 a year out there? I made all told about \$3,700 a year.’ I left that to both of you people to figure up.

That is your figuring up? No, the examiner, I think, figured that up.”

The plaintiff was absent for more than a year. During that time the defendant heard nothing from him, received nothing on account of his debt either from the plaintiff himself or from Teetzel. The property in Teetzel’s hands had been sold, but the defendant got no benefit from it. The sheep the plaintiff had told him about were not his own property at all but belonged to some estate of which he was an executor, and none of the plaintiff’s promises in respect of his debt had been fulfilled. Under the circumstances, in my judgment, the defendant had very good reason to believe that when the plaintiff went away he intended to defraud his creditors, notwithstanding the public and open manner in which he took his departure. His subsequent conduct was very good evidence of his motive, or one of his motives in going away, and if that is a proper inference with respect to his original going away, I think the same intent would be imputable to him during his absence abroad, and upon his intended return to his new domicile on the last occasion.

Under these circumstances I do not see that there was

either any *suppressio veri* or *suggestio falsi* in the defendant's affidavit, that is, with respect to anything material, anything which would or might have induced the learned Judge to refuse instead of granting the order. The only inaccuracy of statement in the affidavit is that he had acquired the note which constituted part of his debt at the time of the plaintiff's first departure. It seems he did not acquire that note until July afterwards. That statement was probably an inadvertence, but it would not, however, have made any difference in the propriety of granting the order. A man may go away with intent to defraud creditors for sums under \$100 as well as creditors for larger sums, although only the latter class can arrest him, and although the defendant could not have arrested the plaintiff when he went away the first time, his debt being then less than \$100, he was as much defrauded by the going away as if he had been a creditor for a larger sum.

Judgment.
MACLENNAN,
J.A.

It is true that in his affidavit the plaintiff says nothing about the Teetzel deed or about the sheep, or the plaintiff's promises before he went away, but the omission of these things could have had no influence with the Judge unfavourable to the plaintiff, and is not anything of which he has room to complain.

BURTON, J. A. :—

I agree with my brother MACLENNAN.

Appeal dismissed with costs.

KENNEDY V. AMERICAN EXPRESS COMPANY.

Carriers—Knowledge of Special Purpose—Damages—Nondelivery of Animals.

Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company, including anticipated profits.

Judgment of the County Court of Wentworth reversed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the County Court of Wentworth.

The plaintiff was a dog fancier living at the city of Hamilton, and was in the habit of exhibiting his dogs at dog shows in Canada and the United States. On the morning of the 21st of November, 1892, he delivered to the Canadian Express Company, at the city of Hamilton, five dogs to be carried to Brooklyn, U.S., to be exhibited there at the National Greyhound Club Dog Show on the 22nd of November, 1892. The dogs were carried to the Suspension Bridge by the Canadian Express Company and reached that place about twelve o'clock on that day and were there placed in charge of the defendants. Some difficulty then took place as to customs duties and the dogs were detained and were not forwarded from the Suspension Bridge until the evening of the 21st of November. The plaintiff stated that he told the agent of the American Express Company at the Suspension Bridge that it was necessary to have the dogs delivered early the next morning at Brooklyn in order to enable them to be exhibited at the dog show. There was a conflict of evidence as to the train by which they left the Suspension Bridge and a conflict of evidence as to the time when they arrived in New York, but it was found by the jury that they had arrived in New York about seven o'clock on the morning of the 22nd of November, 1892. They were not delivered in Brooklyn till late in the afternoon and they were then too late to enter the competition.

The action was tried at Hamilton on the 14th of June, 1894, before his Honour Judge Muir, and a jury, when a verdict was found in favour of the plaintiff for \$200 damages. The plaintiff put in particulars of expenses amounting to \$76 for entrance fees, railway and hotel expenses, and express charges, etc. Statement.

The defendants moved against the verdict before his Honour Judge Muir, who reduced the damages to \$40, giving the plaintiff County Court costs. The defendants then appealed to this Court, and the plaintiff cross-appealed on the ground that the damages should not have been reduced, and the appeal and cross-appeal were argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 28th of January, 1895.

A. Bruce, Q. C., for the appellants. The defendants were only bound, in the absence of a special contract, to deliver within a reasonable time: *Taylor v. Great Northern R. W. Co.*, L. R. 1 C. P. 385, and according to their usual custom, and this they did in this case. The plaintiff had, therefore, no cause of action: *Hales v. London and North-Western R. W. Co.*, 4 B. & S. 66; *McKean v. McIvor*, L. R. 6 Exch. 36; Hutchinson on Carriers, 2nd ed., section 328 *et seq.* The damages assessed by the jury were excessive, and if the plaintiff is allowed the reduced amount he should have costs on the Division Court scale.

G. Lynch-Staunton, for the respondents. The question is one of fact and the jury have found in the plaintiff's favour. The defendants having, as must now be assumed, been guilty of unreasonable delay in delivery are liable in damages and the learned Judge had no power to reduce the amount fixed by the jury. Even if the plaintiff is entitled to only the reduced amount, however, the allowance of the County Court costs is proper, as the defendants carry on business out of the Province and cannot be sued in the Division Court.

A. Bruce, Q. C., in reply.

Judgment. April 5th, 1895. HAGARTY, C. J. O.:—

HAGARTY,
C.J.O.

The jury have found that the dogs arrived in New York by the early train at about 7.20 a.m., and not, as the defendants assert, by the train arriving some three hours later.

We must accept this finding. My perusal of the evidence would induce me to think that the defendants' contention was right, but there was evidence on the other side sufficient to support the finding.

In this view I am unable to say that there was not sufficient evidence of delay in delivery at Brooklyn. The distance between the Express Company's office or depot in New York was not such as to require nine or ten hours to deliver such things as live dogs at Brooklyn, sent by express, and from their very character requiring and calling for more prompt delivery than bales of inanimate freight. I do not think the jury erred in their finding either as to the time of arrival or that there was unreasonable delay in delivery, to such an extent as to warrant interference. I must hold, therefore, that the plaintiff was entitled to some damages. The verdict was for \$200—rather liberal as we may suppose.

The learned Judge on motion for new trial reduced the verdict to \$40 to cover personal expenses, etc. He says there was not a tittle of evidence to shew that the defendants knew of the intention of the shipper as to exhibiting his dogs, that for all they knew they might be sent as a present to a friend. They were addressed to the National Greyhound Club, Brooklyn. The plaintiff swears that he told McKelvin, the express agent at the Bridge, that they were for exhibition at Brooklyn by 10 next morning. He was discussing with him as to the train to send them by as there was some delay there. He was assured they would be in time if they went by the train due in New York about 7 a.m. At New York he says he told the people at the defendants' office that he had dogs in the train which had to be in Brooklyn by 10 o'clock for the dog show. They said they would send them over. When

their agent at the Bridge was examined he admitted that the plaintiff told him the dogs were going to be exhibited at the Brooklyn show. For this reason he hurried them on the train, and some other dogs were shipped for the show. He seemed quite aware of the purpose of their shipment, and that dogs so sent for exhibition would, by their usual custom, be returned free.

Judgment.
HAGARTY,
C.J.O.

I am compelled to differ from the Court below on both points: first, as to the knowledge of the defendants as to the purpose of the plaintiff in sending by express; and secondly, as to the measure of damage. In *Simpson v. London and North Western R. W. Co.*, 1 Q. B. D. 274, the rule seems to be laid down. The plaintiff was in the habit of sending samples of his goods to agricultural shows to exhibit and make profit. On the show ground at Bedford he delivered them to an agent of the railway company to be carried to the show at Newcastle, marked addressed to show ground, Newcastle, and he indorsed the note "must be at Newcastle on Monday certain." Nothing was expressly said as to the plaintiff's intention to exhibit or as to the goods being samples. They arrived at Newcastle late for the fair. The defendants paid into Court a sum to cover the plaintiff's personal expenses. Leave was given to increase the verdict by £20 if the Court should be of opinion, drawing inferences of fact, that the plaintiff was entitled to recover for loss of profit or of time. It was held as settled law that whenever either the object of the sender is specially brought to the notice of carrier, or circumstances from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object and that the evidence shewed common knowledge. Cockburn, C. J., said (p. 277): "As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all."

Judgment.HAGARTY,
C.J.O.

Mellor, J., assents. Field, J., says (p. 278): "As to the difficulty of ascertaining the profits which the plaintiff can be considered to have lost, a sufficient answer is that it must be assumed that the plaintiff would make some profit."

The principle of this case is followed in *Jameson v. Midland R. W. Co.*, 50 L. T. N. S. 426 (1884). A parcel was given to the defendants labelled "W. H. Moore, Show Ground, Lichfield, Staffordshire, van train." Nothing was said at the receiving office as to the purpose of sending or to draw attention to the label. The Court (Lord Coleridge and Mathew, J.) held that the label was sufficient reasonable notice of the purpose for which the parcel was sent to a particular destination for a particular purpose. Damages were assessed on the plaintiff's claim for loss of anticipated profits, expenses, etc.

The case before us of these dogs is, I think, supported by these decisions, and the verdict should not necessarily be confined to the plaintiff's personal expenses. He had a right to ask for damages on his whole case, including anticipated profits and increase of custom in his business, etc., if he satisfied the jury that such a claim was supported by evidence which they were willing to believe.

The defendants, in their motion to the Court below, claimed that the damages were excessive. Although I think they were liberally assessed, I cannot think, however, that we could interfere on any such ground. The amount in such a case as this must necessarily be somewhat speculative, as pointed out in the first case cited; there £20, or say \$100, were awarded over and above the plaintiff's expenses, for which £20 was paid into Court.

I think we must dismiss the defendants' appeal, allow the plaintiff's cross-appeal, and restore the original finding of the jury at trial.

OSLER, and MACLENNAN, JJ. A., concurred.

BURTON, J. A. :—

Judgment.

BURTON,
J. A.

If the case depended only on that part of the appeal which relates to the question of costs, I should have no hesitation in holding with the other members of the Court that we ought not to interfere.

But a question of much more importance, not only to these parties, but of much general importance, arises as to the responsibility of these parties as carriers upon the facts in evidence.

The dogs—the delay in the delivery of which constitutes the cause of action—were handed to the Canadian Express Company, for delivery to the defendants at the Suspension Bridge on the 21st of November, 1892, and they were so delivered between 11 and 12 on the same day to the defendants.

This was the first experience the plaintiff had in sending dogs to New York, and I incline to think to his want of experience some of the trouble which subsequently occurred is attributable. It was ascertained at the Bridge that they had not been properly bonded, and in consequence of this the dogs, which were intended to go by the mid-day train, reaching New York the same evening, did not leave the Bridge until the 5.30 train.

A change had to be made at Rochester; there the first issue of fact arises, it being contended on the one side that they were transferred into No. 10 train reaching New York at 7.20 a.m. the following day, or No. 14 train reaching there about 11 the following morning.

I think there is much in the evidence to lead to the conclusion that they were carried by the latter train, but the jury have found otherwise and that must now be assumed to be correct.

We have to deal, therefore, with what occurred in New York on the assumption that they arrived in New York at 7.20.

What, then, is the law in reference to the liability of carriers of this kind? I do not think any better definition

Judgment.
BURTON,
J.A.

can be found than that expressed by Cockburn, C. J., and Lord Blackburn in *Hales v. London and North Western R. W. Co.*, 4 B. & S. 66: "Where no time is mentioned," said the first of these learned Judges, (p. 71) "for delivering goods carried, the obligation of the carrier is to deliver them within a reasonable time; and that is a question of fact. The person who sends goods is not entitled to call upon the carrier to go out of his accustomed course, or to use extraordinary means of conveyance; but the carrier must do that which is within his power, and which it is reasonable to expect he should do for delivering the goods."

Lord Blackburn adds: "He is bound to carry only according to the route which he holds out to the public. But then he is bound to deliver in a reasonable time, having regard to that route. It is no breach of his duty that he does not carry by a shorter route than that which he professes. If the customer wishes his goods to be sent by a shorter route than the accustomed one, he should ask for it, and if refused he would exercise his choice of sending by another carrier."

Before applying this law, which cannot, I fancy, be questioned, to the facts of this case, I wish to make a short quotation from the learned Judge's judgment:

"There is not a tittle of evidence," he says, "to shew that the defendants knew of the intention of the shipper. For all the defendants knew the dogs may have been a present which the plaintiff was sending to a friend in Brooklyn."

The evidence as to the usual course of business of the company in New York is all one way and is not questioned.

For goods addressed to Brooklyn they made provision for four deliveries, one each after the arrival of the 8, 11, 3 and 7 o'clock trains at the 48th Street station.

It was also their practice, where goods were valued over a certain sum, to have them sent to their Murray street station, and then instead of being sent by the ordinary waggons they were treated like money parcels in charge of men in whom the company have confidence.

It must not be overlooked that these waggons for Brooklyn, whether ordinary or special, have to deliver goods not only at the terminus or station in Brooklyn but along the route.

Judgment.
BURTON,
J.A.

It is sworn, and one can well understand, that a company doing such a large business as an express company in a city like New York could not afford to send out waggons, except at special hours after the arrival of each train, to a place at the distance of Brooklyn; but that did not subject the shipper to any unreasonable inconvenience, he could always apply for a special shipment upon payment of a small additional charge, or he could take the goods himself, and here is again apparent the want of experience of the plaintiff. Had he applied at once on arrival in New York he would have ascertained whether his property had come by the No. 10 train and at what time it would be delivered in Brooklyn, and he could then have made arrangements for a special delivery.

It is clear, when it is borne in mind that the box had in consequence of its being marked valuable to go to Murray street, that it could not be sent by the 8 o'clock delivery, and there is no evidence of any delay after the subsequent hours of delivery.

If it is contended that the jury are entitled to express any opinion as to the reasonableness of the hours of delivery adopted by the company, I dispute that as a matter of law; that would, as I ventured to say in a recent case, be to allow a jury to dictate to the company how they should carry on their business, which, in my humble judgment, they cannot do. There is, therefore, no evidence that the goods in question were not sent in accordance with the accustomed course. If the shipper desired them to be sent earlier it was his duty to ask for them and pay the additional charge. I am of opinion, therefore, that there was no evidence to charge the defendants with negligence, and that the learned Judge should have nonsuited.

Judgment. If the present decision is good law the defendants will be well advised to alter their way bills.
BURTON,
J.A.

Appeal dismissed with costs, and cross-appeal allowed with costs, BURTON, J. A., dissenting.

OLDRIGHT V. GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railways—Railway Station—Negligence—Damages.

A railway company is bound to provide for passengers safe means of ingress to and egress from its stations : and where a passenger arriving at a station at night walked along a platform not intended but frequently used as a means of exit but which was not in any way guarded, and after leaving the platform fell into an excavation in the company's grounds and was injured, the company was held liable in damages. Judgment of the Queen's Bench Division affirmed.

Statement. THIS was an appeal by the defendants the Grand Trunk Railway Company from the judgment of the Queen's Bench Division.

The action was brought to recover damages for injuries sustained under the following circumstances: The plaintiff was a resident of Toronto, and on the 11th of October, 1893, returned to Toronto from Chicago by the Grand Trunk Railway, arriving at the Union Station in Toronto about nine o'clock in the evening of that day. The Union Station as it stood at the time of the accident, was bounded on the west by Simcoe street, and extended easterly from Simcoe street nearly all the way to York street, and it was also bounded on the south by a street running east and west. The principal entrance was from York street and there were arches on the south side by which passengers could go from the inside of the station to the street. There were also arches on the north side through which persons could leave the station and reach the railway yard to the north. At the west end there was

one large arch through which three tracks ran and between the tracks and the south wall was a narrow continuation of the station platform. This continuation sloped down some 14 or 15 feet towards the centre of Simcoe street, and a good many people were in the habit, when it was more convenient for them so to do, of going out of the station by this platform instead of going out through one of the better known exits. The plaintiff got out of the train on the south platform, inside the station, but thought she was on the north platform, and instead of walking towards the York street exit she turned the wrong way and walked along the platform to Simcoe street. Certain works were being carried on by a man named McDermid, as contractor for the railway company, in connection with the alteration of the station building, and the plaintiff on leaving the Simcoe street platform fell into an unfenced excavation on the defendants' premises and was seriously injured. There was nothing to indicate that the platform leading to Simcoe street should not have been used. Statement.

The action was tried at Toronto on the 16th of April, 1894, before STREET, J., and a jury, and on the following answers of the jury judgment was entered in favour of the plaintiff against the defendants, the Grand Trunk Railway Company, and was dismissed as against McDermid, who had been joined as a defendant:—

“Were the defendants, the Grand Trunk Railway Company, guilty of negligence in allowing the hole in question to remain unprotected? Yes.

Did the plaintiff act reasonably in endeavouring to leave the railway station by the western exit and thence to the place where she met with the accident in question? Yes.

Might the plaintiff by the exercise of reasonable care have avoided the accident? No.

Was there anything upon the premises or upon Simcoe street to give notice to the plaintiff that the portion of it at which the accident occurred had ceased to be a public highway? No, none whatever. Danger did exist know-

Statement. ingly by the Grand Trunk, and precaution should have been taken by the company for the protection of the general public.

If the plaintiff is entitled to damages, at what sum do you assess them? At the sum of \$3,500."

This judgment was affirmed by the Queen's Bench Division, and the defendants appealed, the appeal being argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 24th of January, 1895.

Osler, Q. C., for the appellants. The fact that an independent contractor was in sole charge and control of the place at which the accident happened affords a good defence to this action: *Allen v. Hayward*, 7 Q. B. 960; *Steel v. South Eastern R. W. Co.*, 16 C. B. 550; *Purdy v. Grand Trunk R. W. Co.*, 15 U. C. R. 571. There is no evidence that the appellants interfered with the execution of the contract or in any way assumed control of the work, and they are, therefore, not liable for any negligence on the part of the contractor: *Murphy v. Ottawa*, 13 O. R. 334. The exit by which the plaintiff left the station was not a regular exit but merely a space between the rails and the wall of the building which it was necessary to leave in order to prevent injury to persons who might be standing upon the platform by trains entering or leaving the station, and no duty was cast upon the appellants in relation to the plaintiff or any other passenger, to anticipate such an extraordinary mistake as that under which she laboured.

W. Nesbitt, and J. H. Denton, for the respondent. The defendants were bound to keep the station and premises in proper repair and properly lighted, and to furnish a safe and reasonable means of ingress to and egress therefrom, so as to prevent injuries to passengers: *Wood on Railroads*, (Minor's ed., 1894) p. 1334; *Beard v. Connecticut, etc., R. W. Co.*, 48 Vt. 101. The jury have found that the plaintiff acted reasonably in endeavouring to leave

the station by the exit in question, and this finding cannot be interfered with. The evidence shews that the work of building the addition to the station was done by McDermid under the immediate direction and supervision of the railway, and the execution of that work cast upon the defendants the duty of having the excavation properly protected. The cases of an independent contractor have no application whatever here, where there is a contractual duty existing to have the premises in a safe condition. Argument.

J. Bicknell, for McDermid.

Osler, Q. C., in reply.

April 5th, 1895. The judgment of the Court was delivered by

HAGARTY, C. J. O.:—

The plaintiff was unable to give any clear account as to how she fell after leaving the station. She had lost her way and no doubt came through a passage in an opposite direction to her proper exit. There is no doubt that this was not a regular exit for passengers, but the evidence shewed that many persons did go out that way, and there was nothing to notify the public that it was not intended so to be used. The plaintiff unfortunately must have turned the wrong way and then approached and fell into the excavation. Had she known the ground she could have got out in safety.

The railway company brought in the contractor, McDermid, and insisted that he, as a contractor in sole charge of the work, was alone responsible for the excavation being unfenced.

I agree with the trial Judge that the company cannot be absolved from liability on any such ground. Their main liability was to provide safe exit for all passengers alighting from their trains. They employ a man to do certain improvements on their premises and part of his

Judgment. necessary work for them was to make this excavation. In cases like that, persons requiring such work to be necessarily done, and which work, as it were, is the cause of the injury to others, cannot generally shelter themselves from liability.

HAGARTY,
C.J.O.

If the excavation had been on other ground than that of the defendants and the plaintiff had passed by mistake through an unguarded exit and so fallen into the hole, I should incline to think the company would be held liable.

As to defendants' duty to passengers, the learned Judge told the jury: "Now, you will understand that the company is bound as to its passengers to see that their premises are in such a condition in all respects that a person in the exercise of ordinary care may leave them without injury. That is the liability which exists on railway companies with regard to persons getting off their trains. It is not sufficient that the railway company puts a passenger off on the platform and leaves him there. If they invite them there they must see that their premises are in such a condition that a passenger exercising ordinary care, the care that a reasonable man usually exercises, may leave the premises without injury. And if they do not live up to that obligation, and an accident happens by reason of their neglect, then they are liable for the damages sustained. And if this was one of the places which a passenger might suppose that the company held out as a way of getting away from the station, then they were bound to take care that he could get away from it by that means without injury to himself."

The duty of the company is tersely stated in 2 Wood on Railroads (Minor's ed., 1894) p. 1334: "A railway company is bound to keep its stations and premises in proper repair, and properly lighted, and to exercise proper care in other respects, to furnish a safe ingress and egress for, and to prevent injury to, its passengers who come upon them," citing many American authorities.

A case of *Beard v. Connecticut, etc. R. W. Co.*, 48 Vt. 101, is cited, decided on facts not unlike those before us.

Judgment.

HAGARTY,
C.J.O.

The person injured had taken the wrong route and fell into an opening beyond the defendants' premises. The plaintiff recovered. The judgment of the Court is instructive and amusingly expressed: see also 2 Redfield's American Railway Cases, pp. 531, 532.

This case was fairly left to the jury. There was evidence for them and they have found upon it. Their verdict cannot be said to be unreasonable or one that could not have been fairly found. I cannot see our right to interfere.

No question was argued before us as to the amount of the damages.

Appeal dismissed with costs.

HURDMAN V. CANADA ATLANTIC R. W. CO.

Negligence—Railways—Volenti non fit Injuria.

Where a railway company sent an engine and crew to the yard of a lumber company, and under the direction of servants of the lumber company cars of lumber were shunted from place to place by this engine and crew, the railway company were held liable in damages for the death of a servant of the lumber company, who was in a car counting lumber, caused by negligence in the management of the engine.

A finding by the jury that "the deceased voluntarily accepted the risks of shunting" was held to mean that he had accepted the ordinary risks and not risks arising from negligence.

Smith v. Baker, [1891] A. C. 325, applied.

Judgment of the Queen's Bench Division, 25 O. R. 209, affirmed.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 25 O. R. 209, where the facts and arguments are stated, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 25th of January, 1895.

W. Nesbitt, and *H. E. Rose*, for the appellants.

McCarthy, Q. C., and *G. E. Kidd*, for the respondent.

April 5th, 1895. HAGARTY, C. J. O.:—

I am of opinion that the defendants cannot uphold their argument that the lumber merchants are alone responsible for any negligence in the movements of the engine within their yard. For mutual convenience and management of traffic the railway company and the lumber merchants laid a track from the main line into their yard, and the engine drew in empty trucks or cars and took out loaded cars for transport over the line in ordinary course. The railway company left the empty cars and took any such loaded cars as the lumber merchants pointed out, but the engine was always under the management and control of the railway engineer, driver or conductor.

This action is based upon an alleged negligent management of an engine in shunting the car in which the

deceased was, as a workman of the lumber merchants, so as to make it collide violently and with greater force than was necessary, whereby the lumber therein was thrown together and the deceased killed thereby.

Judgment.
HAGARTY,
C.J.O.

There was the usual contradictory evidence as to the management of the engine in the shunting, and as to the uncoupling of the cars and the alleged force with which the car in which the deceased was collided with the others.

The death was caused by the shifting of the piles of lumber consequent on the concussion. The deceased was caught between the piles and instantly killed.

A witness named Elmett, employed in the yard as a shipper of lumber, said that the deceased had been some months working in the yard.

A long discussion took place at the trial and before us as to whether deceased had not voluntarily taken on himself all the risk of the shunting process.

Elmett gave this evidence:—

[The learned Chief Justice read a portion of the evidence of this witness, who stated that he had warned the deceased of the danger of remaining in the cars while shunting was being done.]

Elmett also stated that a shifting of the lumber was the danger to be apprehended and that he never saw that happen except from a sudden stoppage of the car, that either a sudden start or a sudden stop might do it; the danger being increased by the speed of the car and the suddenness of the stop.

The following were the findings of the jury:—

[The learned Chief Justice read them and continued:]

As to there being evidence properly to be considered by the jury there seems to be little question, and I do not see any safe ground of interference. If there was negligence I have already stated that it is the negligence of the railway company.

The answer to the 4th question was much pressed as a defence.

In the first place, any supposed bargain as to under-

Judgment.

HAGARTY,
C.J.O.

taking risks was between the deceased and the lumber merchants in whose service he was. I can understand its application to the case of an injury received in that employment from any ordinary danger incidental to the work, but it is here sought to bar an action against another party arising from the proved negligence of such party.

All that is shewn against the deceased is that he was warned as to certain dangers which might arise in shunting from the shifting of lumber caused by sudden start or stop. All that the finding of the jury amounts to is that after such warning and knowledge he continued in the service. If this be an answer in this case it would be equally so if the defendants' train came into the lumber yard at an unreasonably negligent speed, striking violently against a line of loaded cars, displacing the lumber and causing injury or death to an occupant thereof doing duty therein.

The general law is fully discussed in *Smith v. Baker*, [1891] A. C. 325. The Lord Chancellor says (p. 336): "For my own part, I think that a person who relies on the maxim (*volenti etc.*) must shew a consent to the particular thing done. * * (p. 338) I am of opinion myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself."

The judgment of Lord Herschell is particularly instructive. He says (p. 362): "Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered." This applies with special force to danger arising as here, not from the employers' negligence but that of the defendants, with whom the deceased had no contract, express or implied.

I think the defence on this fails.

As to the objection urged to the deceased being unnecessarily in the car at moment of injury, I do not think the evidence calls for or supports any defence.

BURTON, J. A. :—

Judgment.

BURTON,
J.A.

Upon the findings of the jury I think the plaintiff is entitled to judgment.

If guilty of negligence, as the jury have found the defendants were, I cannot understand how the answer to the 4th question affords any defence.

The position the deceased occupied, between two piles of lumber, I should have thought a very dangerous one, even if the shunting had been carried out with the utmost care, but the jury have found that it was not carried out with care and that the accident was the result of that want of care.

I am of opinion, therefore, that the judgment should not be interfered with and that the appeal should be dismissed.

OSLER, J. A. :—

On the whole, I concur in dismissing the appeal. There was evidence of negligence proper for the jury, the defendants' servants knowing that the deceased was in the car in which the lumber was piled, and the finding of the jury on that point cannot be disturbed. The difficulty is caused by the 4th question and answer: "Did the deceased, knowing the danger, voluntarily accept the risks of shunting? The deceased voluntarily accepted the risks of shunting." This at first sight might seem opposed to the answers finding negligence, because if it were to be inferred therefrom that the deceased had absolved the defendants from any duty towards him of taking care in the management of the shunting engine, then there was no breach of duty on their part, no negligence of which he or the plaintiff could complain. The defendants do not assert that the deceased was guilty of contributory negligence, which assumes or admits negligence in the first instance on their part. Their defence is rested on the application of the maxim *volenti non fit injuria*. The deceased, they say, was assenting to all risks of shunting incident to his

Judgment.

OSLER,
J.A.

situation in the car, even to those incurred by their negligent or improper management of it: in other words, that they were entitled to conduct their operations without regard to the fact that he was in the car. But the answer of the jury, in my opinion, does not go so far as this. It can only be understood as affirming that the deceased assumed or accepted the risks incident to shunting, so far as the operation, when performed with reasonable care, would be intrinsically dangerous to a person in his situation, not that he assented to their managing it just as if he were not in the car. Given that the shunting was performed without unnecessary violence, such an occurrence as the shifting of the lumber was not inevitable, and here it was the unnecessary force used which produced that result and thereby caused the death of the deceased. It is a question of fact in every case in which the maxim is invoked what risks were accepted, and it ought to be very clearly made out that that of negligence was one of them: see Pollock's Law of Torts, 3rd ed., p. 154. There is no evidence here that it was, and the jury have not said so; the question and answer must, therefore, be rejected as irrelevant. There is much in the recent case of *Smith v. Baker*, [1891] A. C. 325, which supports this conclusion, nor does the fact that that was a case under the Employer's Liability Act affect its application.

With regard to the only remaining point, viz., whether the engine was managed by the servants of the lumber merchants, or by the railway company, I am of opinion that it was still controlled by the servants of the latter, so as to make the railway company responsible for any negligence in the management of it. The test is whether the lumber merchants could have insisted upon discharging the defendants' engineer and other servants from the management of the engine and have placed other persons in charge of it. It is clear that they could not have done so. The defendants had not given them the use of it on such terms as those. The most that can be said is that the lumber merchants could direct the

moving of the engine from one part to another in their yard with regard to the lumber to be shipped, but beyond this the working and management of the engine were done by those who were in that respect the servants of the defendants.

Judgment.

OSLER,
J.A.

MACLENNAN, J. A. :—

I agree.

Appeal dismissed with costs.

FITZGERALD V. CITY OF OTTAWA.

Municipal Corporations—Drainage—New Territory—Old Drain.

Where a municipality makes alterations in and thus adopts as part of its own drainage system a drain existing in territory acquired from another municipality, it is liable for damages caused by subsequent neglect to keep the drain in repair.

Judgment of BOYD, C., 25 O. R. 658, affirmed, MACLENNAN, J. A., dissenting.

THIS was an appeal by the defendants from the judgment of BOYD, C., reported 25 O. R. 658. Statement.

The plaintiff was the owner of land situated on the south side of Pine street in the city of Ottawa, and formerly part of the township of Nepean. Before the territory was added to the city the plaintiff and the owners of some land adjoining his, made a box drain to carry off surface water that collected on Pine street. After the territory was added to the city the box drain fell into disrepair, and the city engineer, on the plaintiff's complaint, refused to repair it, but had an open drain cut across the street to carry off the water. This drain in the next year became filled up, and the water overflowed the plaintiff's land. The city refused to remedy the defect, and this action was brought to recover damages.

It was tried at Ottawa on the 16th of October, 1894, before BOYD, C., who, on the 23rd of October, 1894, gave judgment in the plaintiff's favour.

Argument. The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., and STREET, J., on the 29th of March, 1895.

Moss, Q. C., and MacTavish, Q. C., for the appellants. The box drain was not constructed by the appellants, and formed no part of their drainage system, and they are not liable for want of repair, nor are they liable for not providing an outlet for this surface water. That is mere non-feasance, for which a municipality is not responsible: *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400; *Glossop v. Heston Local Board*, 12 Ch. D. 102; *Attorney-General v. Guardians of Dorking*, 20 Ch. D. 595; *Law v. Niagara Falls*, 6 O. R. 467; *Welsh v. St. Catharines*, 13 O. R. 369; *Ward v. Caledon*, 19 A. R. 69; *Bryce v. Loutit*, 21 A. R. 100. The learned Chancellor refers to and relies on Wood's Law of Nuisances, 2nd ed., sec. 749. But the statement in that work is based upon authorities in all of which there was some active interference by the municipality, and the rule laid down does not apply here: *Lynch v. New York*, 76 N. Y. 60; *Armstrong v. Brunswick*, 79 Mo. 319; *Pictou v. Geldert*, [1893] A. C. 524; Dillon on Municipal Corporations, 4th ed., sec. 1046. The cases of *Broder v. Saillard*, 2 Ch. D. 692, and *Hurdman v. North-Eastern R. W. Co.*, 3 C. P. D. 168, cited by the learned Chancellor, are cases of artificial erections causing more water to flow than would flow in a state of nature. The damages are excessive. The plaintiff could have kept the drain open at slight expense and have avoided all loss.

Wm. Wyld, for the respondent. The defendants adopted the box drain as part of their system, and then made the cutting to carry off the water, and it is now too late for them to contend that they are not interested: *Lewis v. Alexander*, 21 A. R. 613; *Brown v. Sarnia*, 11 U. C. R. 87; *Northwood v. Raleigh*, 3 O. R. 347; *Rowe v. Rochester*, 29 U. C. R. 590. The defendants refused to allow the plaintiff to repair the drain.

Moss, Q. C., in reply.

May 14th, 1895. HAGARTY, C. J. O. :—

Judgment.

HAGARTY,
C.J.O.

I accept the facts found by the learned Chancellor as fairly warranted by the evidence, and I cannot say that there is ground for our interfering with his result.

I expressed my views as to the position of a city or town within whose limits a tract of land is by statute included, where some existing drain had been previously constructed, in the case of *Lewis v. Alexander*, 21 A. R. 613, and the judgment of this Court has just been affirmed by the Supreme Court.

This case is not embarrassed by any argument to be drawn from a case in which the city never interfered with the old drain in any way, as I think there was clear proof of interference by the defendants, and of the temporary relief given by the defendants causing the water to flow in a different direction from the broken down box drain, which for a season completely relieved plaintiff's land from the overflow. But the slight surface drain or repair done by the defendants soon got out of repair, and the water resumed its direction down to plaintiff's land to his injury.

The evidence shews that the natural flow of the water was eastward down Pine street, and the old box drain, while in fair repair, carried off this water.

When the box drain became choked up the water came round on the plaintiff's land in a different direction, whether caused by the action of drains cut on the Booth property or the railway to the west connecting with or near the entrance of the old box drain or otherwise.

I think sufficient was shewn to prove an active interference by the defendants with the drainage system of the locality so as to make them responsible for the water leaving its old course and flowing round to the plaintiff's property. But for such interference, there would be great difficulty in holding the city liable merely for nonfeasance.

As the case stands, I do not think that we can interfere with the result of the learned Chancellor's judgment in the plaintiff's favour.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

I think this judgment can properly be upheld. Had the corporation done nothing with regard to the drainage of the territory in which the plaintiff's lots are situate, after it had become part of their municipality, I have no doubt they could not be made liable merely for not repairing the box drain, which had been constructed by the lot owners while the lands were part of the township of Nepean. Nor, indeed, is the action even now in strictness maintainable merely for non-repair of that particular drain. It became, however, out of repair, and in consequence thereof the water which had formerly been carried away through it towards Preston street passed down across lot seven on Pine over and across the plaintiff's lots, flooding and damaging them. Complaint being thereupon made and the policy of the corporation being not to construct or assume box drains, the defendants refused to allow this particular drain to be reconstructed or repaired, and relieved the cause of complaint by constructing a surface drain on the north side of Pine street, diverting the waters which were flowing into the plaintiff's premises by a cut off, primitive enough in construction, but effectual for the purpose, which diverted these waters into their surface drain on Pine street.

It is true that they did not do much, but they did enough to shew that they were assuming that drainage, and I think they were bound thereafter to see that their work was so kept in repair that the injury which it relieved should not again occur in the ordinary state of things, that is to say, that so far as such work was effectual in draining the water away from the plaintiff's land it should be kept and maintained in a proper state of repair. What was done by the defendants, in short, was in substitution of the box drain, and the appeal should therefore be dismissed.

STREET, J. :—

Judgment.

STREET, J.

I think that the judgment of the Chancellor should not be interfered with. I should come to the conclusion, from the evidence, that the natural flow of the surface water from the west end of Pine street was along the south side of Pine street. Then the box drain was put in and covered over and the water which up to that time had flowed along Pine street over the surface was carried through the box drain. When that was obstructed, the water found, for the first time, a new outlet over the plaintiff's property. The defendants, as owners of the land, were bound either to restore the surface of the ground to its original condition, or to carry off the water, and having done neither, are liable for the loss the plaintiff has sustained. It was no excuse to them that the surface of the ground had been altered, not by them, but by their predecessors in title.

MACLENNAN, J. A. :—

This appeal raises an important question of municipal law.

There are two short streets in the outskirts of the city of Ottawa named Pine and Margaret streets running east and west parallel to each other and 230 feet apart. Eastward, they end at Preston street which runs north and south. Both streets are closed at the west end by private property used as piling ground for lumber, and two railway lines raised upon embankments run northerly at a distance of several hundred feet. The block of land enclosed by the two streets is 350 feet long by 230 in width, and is laid out into lots 50 feet by 115 feet each, seven fronting on Pine street and the other seven on Margaret street, numbered from the east from one to seven on each street. The plaintiff is, and has been for a good many years, the owner of lots 4, 5 and 6, fronting on the north side of Margaret street. Before the 1st of January, 1889, these lots and streets were in the township of Nepean, and

Judgment. at that date the city limits of Ottawa were extended so
MAULENNAN, as to include them.

J.A.

The plaintiff's claim is for damages by flooding in the years 1891, 1892 and 1893. The cause of action which he states (paragraph 3) is that the defendants by means of a ditch by them constructed in and along Pine street, brought large quantities of water upon the south side of the street which passed through and along that ditch to an outlet provided therefor by the defendants on Preston street; that afterwards the defendants negligently allowed the ditch to be out of repair, and to become choked, whereby the water which was accustomed to flow in it was discharged upon and overflowed the plaintiff's land. In two other paragraphs he varies his complaint by charging that the defendants brought a large quantity of water upon Pine street and neglected to provide an outlet whereby the plaintiff's lands were overflowed; and that having brought water upon Pine street they wrongfully and negligently dammed and pressed it back, and caused it to be overflowed on the plaintiff's lands.

The case thus stated was, however, not proved at the trial. What was proved was as follows: The natural flow of the surface waters from the railway lands and the piling grounds west of Pine street is eastward towards that street. There is no question of any natural water-course, and it is these surface waters alone with which the case is concerned. Some years before the extension of the city limits the owners or occupiers of the three lots in rear of the plaintiff's lots, viz., lots 4, 5 and 6, on the south side of Pine street, put down a box drain in front of their respective lots, that is, for a distance of 150 feet, and covered it over with earth to a depth of about two feet, the effect of which was that the surface water coming from the west passed through the box and escaped entirely through one open ditch to another open ditch on the west side of Preston street. It is also in evidence that before this box drain was put down the water used to pass along the same course to Preston street. It is also proved that

in 1889 or 1890, Mr. Pratt, an agent of Mr. Booth, the owner of the piling ground, had put down a box drain connecting with a pipe drain under the railway embankment extending across the piling ground towards the Pine street box drain and coming to the surface at the limit of Mr. Booth's land where it joined the street. The effect of this was to increase the volume of water which would naturally collect at that point. In the space between the end of this box drain of Mr. Booth, and the box drain on Pine street, about fifty feet, there was also an open drain, but by whom or when it was made does not appear. Up to this point there is no evidence of any act done or interference by the defendants, and the plaintiff had no cause of complaint, for the water passed away to Preston street and did not go in his direction.

Judgment.

MACLENNAN,
J.A.

Soon afterwards, however, the box drain on Pine street became choked up, and lot seven on Pine street being low, marshy ground, the water spread over that lot and reached the plaintiff's land and overflowed it. Thereupon the plaintiff complained to the city engineer and to Alderman Hill, and soon afterwards by direction of one or the other, a channel was opened, angling across to the north side of Pine street from the west end of the box drain, and that had the effect of diverting the water in that direction and preventing it from further flowing to the plaintiff's land. It does not appear that this was done in pursuance of any direction or resolution of the city council or of any committee thereof, if that would make any difference. Before long, however, the channel across Pine street became filled up, and the water began to overflow the plaintiff's land again, and continued to do so until about November, 1893, when the defendants repaired the old box drain and restored it to its original efficiency.

This action was brought on the 9th February, 1894. The learned Chancellor has decided that the city is liable for the injury which the plaintiff suffered from the overflow of his lands and has awarded him a judgment for \$400.

Judgment. With great respect, I am unable to agree with the
MAULENNAN, judgment. I do not think that this case is governed
J.A. by either of the cases cited. In *Broder v. Saillard*, 2
Ch. D. 692, although the defendant had not built the
stable and was only a tenant of the premises, yet the
horses which made the noises complained of were his
horses, and the offensive moisture which percolated
through the plaintiff's wall proceeded from the water
used in the stable; so that the whole nuisance complained
of was caused by the defendant. So also in *Hurdman v.*
North-Eastern R. W. Co., 3 C. P. D. 168, the case alleged
was that the defendants had deposited against the plain-
tiff's wall a mass of rubbish which raised the surface
above the level of the land on which the plaintiff's house
was built, so that the rain which fell on the rubbish oozed
through the plaintiff's wall into his dwelling-house, and it
was held that a good cause of action was disclosed. In
the present case, however, it is completely disproved that
the defendants collected the water at the point whence it
overflowed upon the plaintiff. The water came there in
great part by natural means, the ordinary natural flow of sur-
face water from a higher to a lower level, and for the rest by
reason of the box drain put down by Mr. Pratt across the
piling ground. So, also, the defendants had nothing to do
with the laying down of the box drain in Pine street origi-
nally, nor with the covering it over or stopping it up.
All that was done by the adjacent owners, and so far as
the plaintiff's injury arose from the box drain or its stop-
page, it was not caused by anything done by the defen-
dants. The only thing actually done by the defendants
was the cutting of the channel across the street, which
gave the plaintiff relief for a time; but it cannot be said
that the plaintiff's damage was caused by that act, which,
indeed, instead of being injurious to him, was really
beneficial.

But the learned Chancellor seems also to rest his judgment
on a general duty of the city after the highway and the drain
became vested in them, either to repair the old box drain

or to keep open and efficient the new channel which they had cut across the street so as to protect the plaintiff from the overflow of the water. No authority for such a duty or for the liability of the defendants for its neglect in such circumstances as the present was cited, either by the learned Chancellor or by the learned counsel on the argument before us. The cases cited by the counsel are all cases such as *Brown v. Sarnia*, 11 U. C. R. 87, and *Rowe v. Rochester*, 29 U. C. R. 590, in which the injury arose from acts done by a municipality, which is not the present case at all. I am not aware of any authority for any such duty or liability. So far as cases in our own Courts go, they appear to be against it. In *Darby v. Crowland*, 38 U. C. R., 338 it was decided that the defendants were not liable for stopping up a culvert across a highway through which the surface water from the plaintiff's land adjoining had been in the habit of escaping, and in *Gray v. Dundas*, 11 O. R. 317, affirmed in this Court, 13 A. R. 588, it was held that the defendants were not liable for the fouling of a stream by means of a municipal drain otherwise harmless, into which a factory company permitted noxious water from their works to escape.

I think it may be stated as clear, that inasmuch as the injury complained of was not caused by any positive act of the defendants, they cannot be liable, unless they are made so expressly or by necessary implication by the Municipal Act. Is there anything in that Act imposing any such liability? With regard to highways and bridges, section 531 [55 Vict. ch. 42 (O.)] imposes on the municipality the duty of repair, and also gives an express remedy by action for damages sustained by its neglect. By subsection 3, also, of the same section, the duty to repair crossings, sewers, culverts, approaches, etc., upon toll roads, is imposed on the municipality, and in like manner an action for damages is expressly given to any person injured by neglect. But I do not find that any action is given by the Act for neglect to repair a box drain made by private persons on a highway, not because the highway was thereby

Judgment.
MACLENNAN,
J.A.

Judgment. out of repair, but because the box drain failed to keep
MACLENNAN, surface water from overflowing the neighbouring land.
J.A. Neither, so far as I have been able to discover, is any duty or liability imposed by the Act in respect of surface water collected on a highway, to take care of it, and to prevent it from overflowing adjoining lands, when the corporation has done nothing to collect the water.

No doubt it may in certain cases be a duty, and a duty for the neglect of which they will be liable to persons injured, to remove water which has collected on a highway, by making or repairing drains or whatever is necessary, but that duty is one owing only to persons using or intending to use the highway as a road, and not to neighbouring proprietors whose lands were or are in danger of being thereby overflowed.

In my opinion the defendants owed no duty whatever to the plaintiff in respect of his lands to prevent the overflow of the water in question, either by repairing the box drain or by making some other channel for it. But for the express enactment giving a right of action to persons injured by non-repair of a highway or bridge, no such action would lie, even though the duty to repair had been imposed. This is what was decided by *Cowley v. Newmarket Local Board*, [1892] A. C. 345. There the distinction was made between nonfeasance and misfeasance, and the defect in the road having been the act of another person the defendants were held not to be liable. The same rule was applied in *Pictou v. Geldert*, [1893] A. C. 524, by the Privy Council, and in *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400. See also *Glossop v. Heston Local Board*, 12 Ch. D. 102, and *Attorney General v. Guardians of Dorking*, 20 Ch. D. 595.

I am therefore of opinion that the defendants are not liable in this action and that the appeal should be allowed and the action dismissed with costs.

Appeal dismissed with costs,
MACLENNAN, J. A., dissenting.

CRAWFORD V. BRODDY.

Will—Construction—Inconsistent Clauses.

A testator by the third clause of his will, made in numbered clauses, devised a lot to his son F., and by the fourth clause he appointed executors and devised another lot to them to be disposed of by them for the benefit of named sons and daughters in certain shares and amounts. In this clause there was the following paragraph: "At the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors":—

Held, reversing the judgment of the Chancery Division, 25 O. R. 635, (STREET, J., dissenting), that this paragraph did not apply to or modify the devise to F. in the third clause.

THIS was an appeal by the defendant, Frances Nixon Statement.
from the judgment of the Chancery Division, reported 25
O. R. 635.

The action was brought for the construction of the will of Francis Nixon, the elder, and to set aside a deed from Francis Nixon, the younger, of lot number 8 in the fourth concession of the township of Chinguacousy, to his brother Adam Nixon, the deceased husband of the defendant Frances Nixon.

The will in question was made in numbered clauses. In the first clause the testator gave directions about his funeral; in the second he devised lot 6 in the third concession of the township of Chinguacousy to his son Adam Nixon, and he then proceeded as follows:

"3rd. I give and bequeath to my son Francis Nixon, lot number 8 in the fourth concession of said township of Chinguacousy, containing 100 acres more or less, together with all the houses and outhouses thereon erect, at the age of twenty-one years, giving the executors power to lift the rent, and to rent, said executors paying said Francis Nixon all former rents due after my decease up to his attaining the age of twenty-one years.

4th. I appoint Rosa Nixon, James Alderson and Alexander Nixon my executors of this my last will and testament, in whose hands I leave lot number 5 in the third concession of township aforesaid, containing fifty acres more or less, to be disposed of as follows as soon as the lot can liquidate the following:—

Statement.

To my son Franklin Seymour, the sum of 250 pounds of lawful money.

To my son Francis, one acre, being the north-west corner of said lot number 5 in the third concession.

To my daughter Ellen Benson, wife of James Benson, the sum of twenty-five pounds of lawful money.

To my daughter Margaret, the sum of fifty pounds, and in case she pleases the executors in her marriage the sum of twenty-five pounds more.

To my daughter Adeline, the sum of fifty pounds, and in case she pleases the executors in her marriage the sum of twenty-five pounds more.

At the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors.

To my niece the sum of twelve pounds, ten shillings.

To James William the sum of twenty-five pounds.

After the aforesaid are paid, lot number 5 in the third concession falls into the hands of Adam Nixon. And in case the said lot 8 in the fourth concession will not realize the above claims in full, the balance to be paid by Adam and Francis, share and share alike, and in case the lot brings more than said claims the overplus to be paid by my executors to Adam Nixon."

Francis Nixon, the elder, died in 1856. Francis Nixon, the younger, died in 1893, at the age of 53, never having married.

The plaintiffs contended that Francis Nixon, the younger, took only a life estate, and that if he took more than a life estate his deed to his brother Adam Nixon was void for want of mental capacity.

The action was tried at Walkerton on the 4th of April, 1894, before FERGUSON, J., who held that Francis Nixon, the younger, took an estate tail, and that the deed to Adam Nixon was valid.

The Divisional Court held that Francis Nixon, the younger, took a conditional fee with an executory devise over, which had taken effect.

The defendant Frances Nixon appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER and MACLENNAN, JJ.A., and STREET, J., on the 26th of March, 1895. Argument.

T. J. Blain, for the appellant, contended that the paragraph in the fourth clause as to failure of issue did not apply to the devise in the third clause. He also argued as to the construction of the will, assuming that the paragraph did apply, the line of argument on this point being fully stated in the report below.

J. C. Hamilton, and *T. Dixon*, for the respondents.

W. H. McFadden, for the executors.

May 14th, 1895. OSLER, J. A. :—

With deference I think the preferable construction of this will is that which treats the clear distinct devise to Francis Nixon in the third clause as quite untrammelled by the limitation which follows the devises and bequests to the sons and daughters of the testator mentioned in the fourth clause. The will is divided into numbered paragraphs, and I am unable to see anything in the fourth which compels us to say that the words "at the death of any one of my sons or daughters having no issue their property to be divided equally among the survivors," should be extended to the devise to Francis in the third clause. It is true that all the sons and daughters of the testator are not mentioned in the previous part of the third clause, but two sons and three daughters are mentioned therein as legatees, so that the language of the limitation in default of issue is satisfied.

It is impossible to deduce from the whole will that the intention of testator was to subject any of the devises or bequests in his will to this limitation other than those which immediately precede it in the clause in which it is found, and this view finds support from the last devise mentioned in it, viz., to the testator's son Adam, who takes lot 5 in the third concession, subject to the bequests and

Judgment.

OSLER,
J.A.

devise charged upon it, but clearly not subject to the precedent limitation in favour of survivors in the case of the earlier gifts in the same paragraph.

The case seems to me to be eminently one for the application of the rule so forcibly enunciated in *Thornhill v. Hall*, 2 Cl. & F. 22, that "when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate."

On this ground the judgment at the trial dismissing the action should be restored. I see no reason for differing from the learned trial Judge's view of the other part of the case, viz., that no case has been made out for setting aside the conveyance from Francis Nixon to his brother Adam.

The appellants must have their costs of the appeal.

MACLENNAN, J. A.:—

The first question is whether the clause: "At the death of any one of my sons or daughters having no issue their property to be divided equally among the survivors," occurring as it does in the middle of the fourth paragraph, is to be held as extending to the devise to Francis in paragraph three, or whether it ought not upon a sound construction to be confined to the gifts in the fourth paragraph. On the best consideration which I have been able to give to the will I think it ought to be so confined. Each of the four paragraphs into which the will is divided is complete and distinct in itself. The first paragraph deals with his burial and funeral. The second is a direct devise of a lot of land to his son Adam in fee simple. The third is a direct devise to Francis, also in fee simple, at twenty-one years of age. Then comes the fourth, appointing executors and giving into their hands another

lot of land, as he says, to be disposed of "as follows as soon as the lot can liquidate the following." Now, it is clear that the words "as follows," and "the following," extend to the end of the paragraph, that is to the end of the will, and indicate that what follows is meant to express his will in relation to this third lot of land, and the manner in which it is to be disposed of. He first makes gifts out of it to two sons and three daughters, and then pauses to say what shall be done at the death of any one of his sons or daughters leaving no issue. In that case their property is to be equally divided among the survivors. Having now finished with his sons and daughters he goes on and gives £12 10s. to his niece, and to James William, probably a nephew, £25. These last two gifts are also clearly part of the disposition of the third lot, and are to come out of it. The paragraph then goes on. "After the aforesaid are paid, lot number 5 in the third concession falls into the hands of Adam Nixon." It is still the same subject, the disposition of lot 5 in the third concession. To my mind the conclusion is irresistible that this paragraph four down to this point relates to lot 5 in the third concession, and to nothing else, notwithstanding the generality of the words "my sons or daughters" and "their property," and that those words have no relation to the other lots devised in paragraphs two and three. This conclusion is greatly strengthened by the circumstance that the devises to Adam and Francis are direct, and not through the medium of executors, as the disposition of lot 5 in the third concession is.

Judgment.

MACLENNAN,
J.A.

The concluding portion of paragraph four calls for remark. It provides that in case "the said lot 8 in the fourth concession will not realize the above claims in full, the balance to be paid by Adam and Francis, share and share alike, and in case the lot brings more than said claims the overplus to be paid by my executors to Adam Nixon." It is evident that here lot 8 in the fourth concession is a mistake for lot 5 in the third concession. That it is a mistake is very plain from the context, and so plain that there is no difficulty in

Judgment. rejecting the words "8 in the fourth concession" as a misnomer or misdescription for 5 in the third concession. The whole of the context fits the latter lot, and does not fit the other: see the cases collected in 1 Jarman on Wills, 5th ed., p. 347 *et seq.* That correction being made, the whole fourth paragraph will stand as a complete consistent whole, dealing with lot 5 in the third concession only, a part of the testator's estate separate and distinct from the parts disposed of by the preceding paragraphs two and three. The effect of this last part of paragraph four is to give lot 5 in the third concession to Adam in fee simple, except the one acre given to Francis, and subject to the legacies charged upon it. He had an undoubted right upon his father's death to pay these legacies to the executors and to assume possession and ownership of lot 5, with the exception of the one acre. Now, if the argument of the respondents is good, that the survivorship clause applies to Francis and his lot 8 in the fourth concession, it must also apply to Adam and his lot 6 in the third concession, and also to lot 5 in the third concession as well, and the strange result might be that after Adam had paid the legacies charged upon one of the lots devised to him he might die without issue and both estates would go over, whereby he would be a loser. So, also, the clause casts upon both Adam and Francis the obligation, if they accept the devises to them, to make good in equal shares any deficiency in the legacies. That also is inconsistent with the estates given to them being defeasible, and liable to go over in case of their having no issue at their respective deaths.

Under the old law, when a devise without words of limitation passed only an estate for life, it was held sufficient indication of an intention to confer a fee simple, that the will imposed a personal charge upon the devisee: Theobald, 3rd ed., p. 303. And the reason was that otherwise the gift instead of being a benefit might be a loss to the devisee and his estate, if he died immediately after paying the charge, a result which the testator could not have intended. So here the testator could not have intended Adam and

Francis to have defeasible estates and yet to be liable to pay the deficiency of the legacies.

Judgment.
MACLENNAN,
 J.A.

I think, therefore, that the survivorship clause is a part of the disposition "as follows," mentioned in the commencement of paragraph four of the will, and that that disposition being of lot 5 in the third concession only, the survivorship clause is also confined to that lot, and is not applicable to lot 8 in the fourth concession devised to Francis at all.

It is admitted that Francis attained the age of twenty-one years, and it follows that he became indefeasibly seized in fee simple of the land in question.

It is therefore unnecessary to consider or decide the other question which was debated before us, whether the death leaving no issue meant an indefinite failure of issue or a failure at the death of the devisee or legatee, and the result is that, in my opinion, the appeal ought to be allowed, and that the judgment of my brother Ferguson ought to be restored.

HAGARTY, C. J. O. :—

I am of the same opinion.

STREET, J. :—

In my opinion the judgment appealed from is right, and should be upheld.

The clause in the will giving rise to the present dispute is in the following words: "At the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors."

Looking at the terms of this clause and its position with reference to the other parts of the will, I can see no safe ground for confining its operation to any particular set of gifts in the will, and I think it must be taken to apply to every gift contained in it.

I think the question is covered by the decisions of *Rane-*

Judgment. *lagh v. Banelagh*, 2 M. & K. 441, and *Greenwood v. Verdon*,
STREET, J. 1 K. & J. 74. The principle of those cases is that where the testator intended to give a personal benefit to those to whom the estate is limited in default of issue, as distinguished from a transmissible interest which their representatives might take, an indefinite failure of issue cannot have been the intention of the words "having no issue." The gift to Francis Nixon, contained in the will, of lot 8 in the fourth concession, was, in my opinion, therefore, a devise to him of an estate in fee simple defeasible, and which in the event was defeated by his death without leaving issue living at his death. The plaintiffs are the children of the testator Francis Nixon, the elder, who survived the devisee Francis Nixon, the younger, and they are entitled to take under the executory devise.

The appeal should, in my judgment, be dismissed with costs.

Appeal allowed with costs,
STREET, J., dissenting.

GORDON V. DENISON.

Trespass—Police Magistrate—Jurisdiction—Warrant to Compel Attendance of Witness—Right of Police to Search Witness Arrested—Duty of Constable—R. S. C. ch. 174, sec. 62—Malicious Arrest—Imprisonment—Damages.

Where a police magistrate acting within his jurisdiction under R. S. C. ch. 174, sec. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpoena, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest.

Judgment of the Common Pleas Division, 24 O. R. 576, affirmed.

In an action for false imprisonment judgment cannot be entered upon answers to questions submitted to the jury, and a finding, in answer to a question, of a certain amount of damages, is not equivalent to the general verdict which must be given by them.

The right of police to search or handcuff a person arrested on a warrant to compel attendance as a witness and the duty of the constable on making the arrest, considered.

Judgment of the Common Pleas Division, 24 O. R. 576, reversed, MACLENNAN, J.A., dissenting.

THESE were appeals by the plaintiff and by the defendant Stephen from the judgment of the Common Pleas Division, reported 24 O. R. 576, and were argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 17th and 18th of January, 1895. Statement.

Osler, Q. C., and H. S. Osler, for the plaintiff.

Delamere, Q. C., and O. R. Macklem, for the defendant Denison.

H. M. Mowat, for the defendant Stephen.

At the conclusion of the argument the plaintiff's appeal was dismissed, the Court agreeing with the Court below in holding that the magistrate had acted within his jurisdiction and was not, in the absence of malice, liable for error in judgment as to the sufficiency of the evidence to justify the issue of the warrant. Judgment was reserved upon the other appeal.

May 14th, 1895. HAGARTY, C. J. O. :—

The action is for trespass and false imprisonment. I agree with the rest of the Court as to the general merits

Judgment. of the case and see no ground for interference thereon.
HAGARTY, But an important question arises, as to whether with no
C.J.O., general or other verdict or finding of the jury in favour of the plaintiff the order for judgment can be supported. The jury was asked certain questions to which they answered "yes" or "no," and to another question stated what damages they thought reasonable to be paid by the defendant. Nothing further occurred as to a verdict.

I have not found any English case in which this particular question arose, as to no verdict being found or entered.

I refer to two or three cases as to the extent to which the Court would go in amending the *postea* by applying the verdict to different portions of the pleading and evidence.

Ernest v. Brown, 4 Bing. N. C. 162. The jury were told that the evidence on the first count was conflicting, but that the plaintiff was entitled to a verdict on the second count with at least one shilling damages. The jury found for the plaintiff one shilling generally and it was so entered by the Associate.

Held, that the *postea* might be corrected by the Judge's notes, and the verdict entered distributively.

Treacher v. Hinton, 4 B. & Ald. 413. The case was undefended at the trial. A nonsuit was directed with leave to move to enter verdict. Held, this might be done. Bayley, J., expressed the view that the Judge having stated in the hearing of the jury that there should be a nonsuit with leave to move to enter a verdict, and the jury having assented to this, the case might be considered as if they had actually given a verdict for the plaintiff, and that the verdict directed by the Court might be considered the act of the jury.

Regina v. Virrier, 12 A. & E. 317, indictment for perjury. Verdict not guilty on first assignment; guilty on second assignment. Verdict so entered. The Chief Justice then made no note of his summing up, but did so afterwards, and having a distinct remembrance and no doubt

of the jury's intention, allowed postea to be altered by entering guilty on the first and third assignments, and not guilty on the second assignment.

Judgment.
HAGARTY,
C.J.O.

Lord Denman, who had made the amendment, said : " On consideration we think that the practice of so amending would be such a dangerous one that as a general rule of discretion, the Court ought to decide against introducing it. In almost all the cases of amendment there has been a written document to amend by, and a misprision, which was corrected by that."

He further says, although he has no doubt, " but, on account of the great danger and abuse which might result from amending under such circumstances, in cases which may be supposed, we think the order ought not to be sustained."

Patteson, J., says : " As to the distinction taken between criminal and civil cases, I have no doubt that the verdict in a criminal case might be amended by the judge's notes, if the Court could see by them, and by the record, how it ought to be entered."

In our own Courts we find *Gower v. Lusse*, 16 O. R. 88, action for malicious prosecution. The Judge, without objection, left questions to the jury. The jury answered the several questions in writing, adding a verdict in favour of the plaintiff, damages \$5.

On motion to enter judgment the general verdict was disregarded, and judgment entered for the defendant on the answers. The plaintiff's counsel objected to this.

In the Common Pleas Division, before Galt, C.J., and Rose, J., the latter giving the judgment of the Court, it was held that when counsel assented by not objecting to the Judge leaving questions to the jury they waived their right to a general verdict, and assented to judgment being entered on the specific findings, just as counsel could have assented to dispense with the jury altogether.

In *Jones v. Smith*, 23 U. C. R. 485, Draper, C. J., said : " There is error on this record. There is a *venire fac. jur.* on which no subsequent proceeding is taken. It is

Judgment.

HAGARTY,
C.J.O.

followed by a statement that afterwards it was agreed that the case should be submitted to the decision of the judge alone and that his decision shall be looked on as the verdict of a jury. Then it is entered that the judge has determined and the court is of opinion that the defendant should pay, etc., which is followed by entry of judgment—therefore it is considered that the plaintiff do recover, etc.

* * No verdict is entered to warrant or support the judgment."

I have examined many cases and text books and have been unable to find any case at all similar to the one before us.

In all the cases there has been a verdict, a finding by the jury for plaintiff or defendant.

The Courts have dealt liberally in amending formal verdicts, confining them to one or more issues, amending the postea to conform to the facts and the evident intention of the jury, as evidenced sometimes by reference to the judge's notes. The cases to which I have referred shew this.

But there has always been a verdict of the jury wherewith to deal, and I have been unable to satisfy myself that we have any right to enter judgment in a case like this, which is specially excluded by the Legislature from the operation of the rule allowing questions to be submitted and judgment entered thereon without an express finding of the jury for plaintiff or defendant.

There was no consent that I can find by the defendant's counsel to dispense with a finding for or against his client. His silence on the point or his not distinctly informing the Court that he insisted on the ordinary course being pursued cannot mend the matter. He was not bound actually to interpose to prevent a slip being made of which he desired to take advantage.

I must, with respect, withhold accepting the decision of *Gower v. Lusse*, 16 O.R. 88, in the Common Pleas, as reported, that not objecting to the judge leaving questions to the jury was a waiver of a right to the general verdict. The judge

has an undoubted right to leave questions to enable him to form his opinion as to the presence or absence of reasonable cause, etc.

Judgment.

HAGARTY,
C.J.O.

Then we are pressed by the argument that the written answers of the jury, concluding with that last answer, finding \$500 in answer to the question of what damages they find reasonable to be paid by the defendant, amount to a verdict for the plaintiff. I fully agree that on these answers the learned Judge might at once have said that amounts to a verdict for the plaintiff and endorsed a verdict therefor, which the clerk of the Court might read to the jury who are told to hearken to the verdict as the Court had recorded it, to which the jury assent, or if they are so pleased dissent. Such was as I have always understood the manner in which the jury lawfully find their verdict. But I am asked to hold all this may be dispensed with as mere form.

I cannot see that it can be so held. The statute provides for a general verdict in a case like this, in the same breath that it dispenses therewith in all the unexcepted cases.

The Court seems to me to be forbidden in the excepted cases from merely asking questions, and on the answers thereto finding as a matter of legal deduction and inference for which party judgment is to be given. There are some sound reasons—notably in libel and slander—why the necessity for a general verdict should be required.

On referring to the record (as it is still called) we find the pleadings, the questions submitted to the jury, and their answers thereto, and on the back the entry by the learned Judge that for the reasons in his written judgment, judgment shall be entered for the plaintiff against the defendant for \$500 and costs. There is no mention or trace of any verdict, general or special, in this record.

In his reasons for judgment the learned Judge says: "All the jury had to do was, if there was no justification, to assess the damages, and this they have done. The fact that such assessment was by answers in writing to written questions can make no difference." Again: "Such assessment is in form and effect a general verdict."

Judgment.

HAGARTY,
C.J.O.

I regret to feel obliged to hold that the absence of a verdict is to vitiate the proceedings so as to render a new trial necessary.

I am unable to agree that what took place at the trial was a compliance with the law requiring a verdict in a case like this. I see no evidence of what the law calls a verdict of a jury, and I dread making a precedent to the effect that answers "yes" or "no" to questions can be held to amount to a verdict where none was actually given.

If a writ of error could still be issued I do not see how the judgment, or order therefor, could be supported from the absence of any trace of the finding of a jury.

BURTON, J. A. :—

I agree fully with the judgment prepared by my brother Maclellan both as to the law and the justice of the judgment, unless some valid objection exists by reason of the case not having been submitted to the jury and a general verdict found by them as the Judicature Act requires.

Upon giving the matter my best consideration, I cannot convince myself that there has not been a mistrial, and I do not consider the objection at all technical or a mere irregularity. The Legislature has declared that, as to one of the causes of action set forth in the statement of claim, the defendant was entitled to have the cause tried by a jury, and that the judge should not have power to submit questions to the jury.

In cases where the judge has power to submit questions to the jury they are relieved from finding any verdict, and judgment is entered by the judge upon the findings as he construes them.

We must be careful not to confound cases like the present with those in which the judge at the trial submits questions to the jury for his own satisfaction, in order to enable him to say that there was or was not reasonable and probable cause, and, having satisfied himself upon that point, he either nonsuits or allows the cause to proceed;

but the answers thus given by the jury have nothing to do with the merits upon which, if the case goes to them, they are ultimately to decide.

Judgment.
BURTON,
J.A.

There seems to have been some confusion at the trial as to the action of Stephen involving a case of malicious prosecution, and Mr. Mowat's remarks as to there being no dispute about the facts had reference evidently to the preliminary question as to reasonable and probable cause. This proved to be a misapprehension. Those questions, which would have been very pertinent for the purpose of deciding that preliminary question, had little or no bearing upon the actions for assault and false imprisonment, but it is upon them the judgment has been entered.

The vice of the proceeding here was, that the learned Judge did put questions to the jury and they were consequently relieved from giving a verdict and were discharged. The law requires that no such questions shall be put but that the jury should be left unfettered in giving their verdict, and the importance of this becomes manifest when we look at the way in which the learned Judge proposed to take a verdict after he had already received and acted upon the findings. That is that having their findings before him, he would have directed the jury to find a general verdict; but surely that would not be carrying out the enactment according to its spirit and intent. What difference would there be, in substance, between entering a judgment upon the findings and directing the jury to find a verdict in a particular way upon the findings?

The matter stood then in this way: the defendant objected to questions being put, but they were put; it appears to have been in the mind of the Judge to take the jury's verdict in addition; but we have seen that what was meant by that was that he would have directed a verdict in a particular way, but it was not done.

It is true that after the jury had been discharged the learned Judge intimated his intention of having the case retried, but the counsel for the defendant refused to consent, and of course he was under no obligation to consent.

Judgment. If in point of fact he thought the proceeding not warranted by the statute, he had a perfect right to rely upon that.
BURTON,
J.A.

That the taking of a general verdict in the manner suggested by the learned Judge would have been a mere formality is evident from what occurred after the jury were discharged, for, he says: "If I had not formally discharged them, on those findings, it would have been my duty to direct a verdict for the plaintiff."

That is not my understanding of the law. There is a case, but I have been unable to lay my hands upon it, in which a learned judge upheld a verdict as a general verdict because a jury, after answering questions, had assessed the damages contingently upon the Court giving judgment upon these findings, but a very little reflection must satisfy anyone that such a view is untenable. The jury in such a case gives no verdict. The finding of damages is simply for the purpose of carrying out the judgment in the event of its being in favour of the plaintiff, but in no sense can it be treated as a general verdict.

I am not at all prepared to say whether upon the evidence as it stands without the aid of the findings the learned Judge would have been justified in directing a verdict for the plaintiff. That may or may not be so; it would have come up on a motion for misdirection but it is not before us now. I do not for a moment doubt that the learned Judge might have directed the jury that upon such and such facts being established to their satisfaction it was their duty to find for the plaintiff or defendant, as the case might be, and to find a verdict and assess the damages accordingly, but that has not been done, and although in this particular case it may be quite possible that the result might have been the same, I do not see my way to allowing this judgment to stand unless I am prepared to overrule the Legislature, which, for reasons to it satisfactory, has declared in clear terms that the defendants in these cases shall be entitled to the verdict of a jury, which it is impossible to say is the case here.

I regret to come to this conclusion, but I am satisfied that sooner or later great confusion is likely to arise if a contrary view be adopted.

Judgment.
BURTON,
J.A.

If the damages had been assessed separately we might have granted the plaintiff some relief.

I think the appeal should be allowed.

OSLER, J. A. :—

I regret to be obliged to come to the conclusion that the judgment at the trial cannot be supported, concurring as I do in what is said as to the general merits of the plaintiff's case, and the illegality of the defendant's conduct. But the action is an action for trespass and false imprisonment, and though as regards the former the learned trial Judge was within his right in requiring the jury to answer questions on which judgment might afterwards be directed, yet as regards the latter no such jurisdiction has been conferred upon him, and the issue ought to have been determined by the unanimous verdict of the jury sworn for the trial: O. J. A., sec. 79. They may, except in an action of libel, be directed by the judge to give, or they may of their own accord give either a general or special verdict. In an action of libel their verdict must be a general verdict. In actions of slander, criminal connection, seduction, malicious arrest or prosecution, and false imprisonment, the verdict may be general or special, but in one or the other of these modes the issues in these actions must be determined. In all other actions questions of fact may be stated to these by the presiding judge. These they must answer "without giving any verdict," and on their findings the judge enters judgment.

A verdict, whether general or special as regards its nature and the mode of taking and recording it, is a proceeding too familiar to common lawyers to require explanation here. It is evidently that well known proceeding which the statute refers to as distinguished from the novel mode of disposing of the issues by a judgment founded on

Judgment.

OSLER,
J.A.

questions and answers : O. J. A. sec. 84. The latter course was adopted in this case contrary to the statute, and what happened was that the jury answered the questions and did not "give any verdict." As to the cause of action for false imprisonment that was wrong. The point is of some importance, and the objection by no means technical or formal merely, because if what took place here may be treated as a general verdict, an action of libel may be tried in the same way and thus to a great extent be taken out of the hands of the jury. The damages having been assessed generally both for the trespass and the false imprisonment, I do not see how it is possible to uphold a judgment founded upon what as to the latter was an erroneous trial. The error appears on the record, and could, under the former practice, have been corrected by a *venire facias de novo* : *Witham v. Derby*, 1 Wils. 48, at p. 55. It is now in such a case simply a new trial as of right. I do not refer to the cases which shew that a verdict might be corrected by the notes of the judge or associate because the difficulty here is that there was no verdict taken or intended to be taken.

The appeal must be allowed.

MACLENNAN, J. A.:—

This is an appeal by the defendant Stephen from the judgment reported 24 O. R. 576.

The amount of the damages seems large, but neither in the Court below, so far as appears, nor in the argument before us, was any objection made to the judgment on the ground of excessive damages. The sole question, therefore, is whether a judgment against the defendant Stephen can be supported for any sum whatever.

The warrant was issued and the arrest was made on the 16th of October; and it was merely to compel the attendance of the plaintiff as a witness before the police magistrate on the 21st of October. When the plaintiff was brought to the station the defendant saw the warrant, and that such was its purport. He told the detectives

who had brought the plaintiff in to search him, and that was done in his presence. They removed from his person his watch and chain, a small sum of money, a note-book, and other articles. The defendant looked over the articles, opened the note-book and looked through it, and then directed everything to be returned to the plaintiff, which was done. The defendant then directed another man to remove the plaintiff and to lock him up. All this time the police magistrate was sitting in Court in an upstairs room of the same building, and the plaintiff had requested to be brought before him. Instead of this being done, he was searched and taken by the orders of the defendant as above mentioned to a cell in the basement where he was locked up for about twenty minutes. He was then brought out and taken before the magistrate, who released him upon his own undertaking, to give his attendance as a witness at the proper time. Now, there is no evidence whatever, of any conduct on the part of the plaintiff which made it reasonable either to search him or to lock him up, before taking him before the magistrate. He was a practising barrister and solicitor and was arrested in his office. He submitted quietly to arrest, and the sole ground of complaint was, that after giving his name and address he refused to answer further questions as to his age and other things which were asked of him, and the asking of which he characterized as impertinence. There is no other complaint whatever, as to his conduct or behaviour. Under these circumstances it is quite clear that he ought not to have been searched, and ought to have been taken at once before the magistrate without being first locked up; and that he was quite right in refusing to answer further questions after having given his name and address.

Judgment.

MACLENNAN,
J.A.

It was argued on behalf of the appellant, that in doing what he did he acted without malice and according to instructions received from the Board of Police Commissioners; but it was not shewn that such instructions were in any way authorized by law, as applicable to such a case as

Judgment. the present, and conceding that he acted in good faith and
MACLENNAN, under instructions, it must still be held that he did wrong
J.A. and is answerable in damages for exceeding his authority.

The law on this subject is stated very clearly by Vaughan Williams J., in his charge to the jury in *Leigh v. Cole*, 6 Cox C. C. 329, as follows: "On the one hand it is clear that the police ought to be fully protected in the discharge of an onerous, arduous, and difficult duty—a duty necessary for the comfort and security of the community. On the other hand, it is equally incumbent on every one engaged in the administration of justice, to take care that the powers necessarily entrusted to the police are not made an instrument of oppression or of tyranny towards even the meanest, most depraved, and basest subjects of the realm. * * He might take all proper and reasonable means for apprehending, securing, and taking before a magistrate; at the same time he must take care not to use any wanton or unnecessary violence in taking these means, and if he does so, then he is answerable in an action for damages. * * With respect to handcuffing, the law undoubtedly is that police officers are not only justified, but they are bound to take all reasonably requisite measures for preventing the escape of those persons they have in custody for the purpose of taking them before the magistrates; but what those reasonable measures are must depend entirely on circumstances, upon the temper and conduct of the person in custody, on the nature of the charge, and a variety of other circumstances which must present themselves to the mind of any one. * * With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the

degradation of being searched, as the searching of such a person must depend on all the circumstances of the case."

Judgment.
MACLENNAN,
J. A.

That statement of the law was made by a very eminent Judge in the year 1853, and there can be no question of its correctness. See also Addison on Torts, 6th ed., p. 719; 1 Russell on Crimes, 5th ed., p. 979; and *Wright v. Court*, 4 B. & C. 596.

At the trial the facts were so little disputed that counsel for the defendant objected to the leaving of any questions of fact to the jury for their decision, but the learned Judge nevertheless did leave certain questions to them, which they answered; and whether we regard those answers or look at the undisputed evidence for ourselves, there can be only one conclusion, namely, that the plaintiff is entitled to maintain his judgment unless prevented by some technical objection.

The only objection which presents any difficulty is, that being an action for false imprisonment, the defendant was entitled to have it tried by a jury (O. J. Act, sec. 76), and that the Judge had no power to submit questions to the jury, but should have required them to give a general verdict: *ib.*, sec. 84.

It cannot be denied that the action against Stephen is in part an action for false imprisonment. The plaintiff was unquestionably locked up by direction of the defendant, and that is one of the things for which he claims damages, and for which also the learned Judge asked the jury to assess damages. He asked them what damages they find reasonable to be paid by the inspector (the defendant Stephen) "for the examination, search and imprisonment." The search was no part of the imprisonment, but was in law an assault; and therefore, while one part of the cause of action was within sections 76 and 84, the other part, the assault, was clearly not; and as to that, the learned Judge could require them to answer questions on which he might himself direct judgment to be entered. The learned Judge, however, did not discriminate between the two causes of action, and submitted questions to them

Judgment. as if the whole was within section 84, and the question is whether that being so the verdict can stand.

MACLENNAN,

J.A.

It was contended at the trial on behalf of the appellant that the plaintiff could not succeed without proving malice and want of reasonable and probable cause, but the acts which the appellant was charged with, having been, as we have seen, clearly in excess of the authority conferred by the warrant, the case was not within section 1 of the Act for the protection of justices and others: R. S. O. ch. 73, but within section 2, and so all question of malice and reasonable and probable cause was out of the case. The learned Judge might, therefore, have said to the jury: "There is no dispute about the facts. The search and the imprisonment are both admitted by the defendant and his counsel. There is not a particle of evidence on which you could be asked to say that these acts were necessary or reasonable. They were, therefore, not authorized by the warrant, and the only question for you is the amount of the damages which you will award to the plaintiff." If upon that they had assessed the damages as they did, that would have been a general verdict for the plaintiff. But the learned Judge in his charge to the jury while giving them his opinion as a matter of law that the defendant was not authorized by the warrant to do what he did, did not so lay it down to them as the law by which they were to be bound in giving their verdict, but rather reserved it for subsequent decision, and asked them to answer certain questions of fact. Before his charge to the jury his attention had been called to the necessity for a general verdict, and he expressed his intention to ask for such a verdict after the questions should be answered.

No objection was made to the charge by the appellant's counsel either during or after its delivery, and when the jury had answered the questions no further reference was made by any one to the necessity for a general verdict, and it passed out of the mind of the learned Judge and the jury were discharged. Now, I think that the appellant certainly cannot complain of anything that was said or

omitted by the learned Judge in his charge. He might have told the jury that upon the undisputed facts the appellant was liable. He did not do so, but asked several unnecessary questions, and asked them to assess the damages, which they did. I think that was all they were required to do as the evidence stood, and that the assessment of the damages was a good general verdict such as the defendant had a right to insist upon, so far as the action was one for false imprisonment. So long as the Court and jury respectively do all that as the case stands it is their duty to do, and so long as their act is in other respects according to law and justice, it ought, if possible, to be upheld, in spite of mere irregularities. I therefore think my brother Rose took a correct view of the force of this objection on the motion before him for judgment, and that the judgment directed by him against the appellant ought not to be disturbed.

Judgment.
MACLENNAN,
J.A.

The appeal should therefore, in my opinion, be dismissed.

Appeal allowed with costs,
MACLENNAN, J. A., *dissenting.*

CANADIAN PACIFIC R. W. CO. v. TOWNSHIP OF CHATHAM.

Municipal Corporations—Drainage—Contract — Ultra Vires—By-law—
R. S. O. ch. 184, secs. 569, 573, 585.

Where drainage works for the benefit of lands in two townships prove as originally initiated and constructed insufficient, an addition thereto costing more than \$200 must be authorized by petition and by-law under the Act, and a contract entered into under seal by one township binding itself to pay the cost of the additional work cannot, even after completion and acceptance of the work, be enforced.

Bernardin v. North Dufferin, 19 S. C. R. 581, considered.

Judgment of the Common Pleas Division, 25 O. R. 465, affirmed, *OSLER*, J. A., dissenting.

Statement. THIS was an appeal by the plaintiffs from the judgment of the Common Pleas Division, reported 25 O. R. 465, where the facts are stated, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J. J. A., on the 4th and 5th of February, 1895.

Moss, Q. C., and *A. MacMurphy*, for the appellants.

M. Wilson, Q. C., and *Pegley*, Q. C., for the respondents.

The line of argument is also stated in the report below, and in addition to the cases there cited the following authorities were referred to: *Attorney-General v. Mayor of Newcastle*, 23 Q. B. D. 492; affirmed [1892] A. C. 568; *Pallister v. Mayor of Gravesend*, 9 C. B. 774; *Elderslie v. Paisley*, 8 O. R. 270; *Ellice v. Hiles*, 23 S. C. R. 429.

May 14th, 1895. HAGARTY, C. J. O.:—

I have come to the conclusion that this work of cutting the culvert under the railway cannot in the most liberal construction of the drainage clauses, be considered as falling within the scope or meaning of the by-law of August, 1890. No intimation whatever was given by that by-law or by the report therein cited of any such work being in contemplation. The mode of passing through the company's property was stated to be an existing opening, the

cattle pass. On this understanding the assessment was levied on the prescribed area in the two townships. The next year there was the large work of having a stone culvert made by the company; the cost running up to \$4,304—an amount nearly equal to the assessed cost of the original undertaking. I think the new work required a special report, a by-law, and the ordinary assessment and revision thereof under the drainage law. I cannot, therefore, agree with the opinion of the council and its legal adviser that the amount could be raised by amending the by-law under section 573, even if such section applied to a case like this of the area of assessment extending over two townships.

Judgment.
HAGARTY,
C.J.O.

This case would seem to fall within section 585, as held by the Common Pleas Division, being “to make a new outlet” to an existing drain, in which case all the machinery provided by the Act should be set in motion (except the originating petition); there should have been the report, assessment, revision, etc.

If, therefore, these requirements were not followed, the case seems narrowed to this point, whether the agreement sued on standing by itself, unsupported by by-law, report or fresh assessment, is legally binding on the ratepayers of Chatham as a debt against them, merely on the strength of the corporate seal attached to it, and the action of their council in passing resolutions approving of the work, paying large sums on account, etc. It is also urged that they have accepted the work, and therefore there is an executed consideration.

The water has been turned into and passes through the culvert. It is not exactly the kind of acceptance of which we usually hear as of the public use of a road or bridge by the general public, or the use and acceptance of a building erected for the corporation.

If we cannot go outside the document to determine its validity, the argument may be strong for the plaintiffs. One of the learned Judges in the Divisional Court considered that the decision of the majority of the Supreme

Judgment. Court in *Bernardin v. North Dufferin*, 19 S. C. R. 581, covers this case. I hardly so understand it. A large portion of the elaborate judgments in that case is devoted to the consideration of the necessity of a corporate seal to create a liability on a municipal body.

HAGARTY,
C.J.O.

I do not propose to decide this case on any such point.

I will assume that the Supreme Court hold that a municipal body can contract for executing a work in their township falling within their ordinary corporate powers and duties, such as roads, bridges, etc., and that if the work is done, accepted, and used by them they are bound and they can bind their constituents, the ratepayers of their township, to pay for it.

We have now to consider whether this work falls within the law of that case.

It is not a work which under the general municipal powers the council may of their own motion direct to be done. It is a work resting wholly on the drainage powers given by the Legislature. It is a work affecting not the township as such, but an area of territory partly in Chatham, partly in Camden, at whose expense and for whose benefit this special legislative remedy is resorted to.

The contract with the plaintiffs professes to be based upon the necessity for providing a new outlet to existing drains.

The correspondence and papers leading up to its execution clearly shew that it was in relation to proceedings under the drainage clauses, and an understanding that the corporation's means of payment would be by amendment of and addition to the by-law already passed under these clauses.

We are at once confronted with the objection which appeared unanswerable to the learned trial Judge, my brother Street, and to the majority of the Divisional Court.

I can understand a municipality having taken all necessary steps under the statute in the levying the required funds from the assessable area in their own and adjoining

township then making the contract in their own name for the construction by the plaintiffs of the required culvert. It is with them that the contractors would naturally make their bargain.

Judgment.
HAGARTY,
C.J.O.

I find it most difficult on the evidence to place the contract in such a position. On its face it professes to be an original dealing with the company by Chatham and on Chatham's own resources, "to be raised by by-law or on their credit in the bank."

I hold it to be, both on its face and on the proved knowledge of the contracting parties, a drainage contract, which had to be and must be governed by the drainage clauses of the Act which regulates the powers and duties of each municipality in dealing with drainage matters.

Lord Bramwell said in *Hunt v. Wimbledon*, 4 C. P. D. 48, at p. 55: "I am by no means sure that persons who are exercising their authority daily should not execute that authority in a proper manner; and I think it desirable that persons who make contracts with those who have an authority delegated to them should not act in a slovenly manner; and if they do not care to inquire what authority such persons possess they must take the consequences."

In speaking of executed contracts the same learned Judge points out that the work should be work which if the corporation had not ordered they would not have done their duty, or if they had not given the order for its execution, they would not have been able to carry out the purposes for which they were called into existence.

The same great Judge says (in the Lords) in *Young v. Leamington*, 8 App. Cas. 517, at p. 528: "The Legislature has made provisions for the protection of ratepayers, shareholders, and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection."

It has been suggested here that Chatham is bound by this contract, and therefore there should be judgment against them and the ratepayers, and it is for them to con-

Judgment.

HAGARTY,
C.J.O.

sider whether they can recoup their expenditure by forcing payment against the assessable area. I cannot accept this argument so as to rest our decision upon it.

I find that on any reasonable construction of the statute the construction of this large work on and under the property of the railway cannot be considered either as authorized or contemplated by the by-law, and that a new report and assessment was necessary.

It follows from this view that section 573 is inapplicable, even if it be held that it applies to work assessable on another municipality.

I am not questioning the views of the Judges below who held it did not so apply.

I also hold that the contract with the plaintiffs must be read with and held to be wholly governed by the drainage clauses, which are the sole authority for the action of this corporation.

It may appear an ungracious defence by a municipal body that they are not bound by a contract under their own corporate seal.

But it is essential to allow such a defence to be urged on behalf of the constituent ratepayers, if their corporation for the time being attempt to exercise their delegated powers in a manner beyond and in excess of the limited jurisdiction allowed by the statute, and in many cases the burden and the duty of seeing that such delegated and limited authority is not exceeded is necessarily thrown on those who enter into contracts with such a corporate body.

BURTON, J. A. :—

I should like very much to agree with the judgment about to be given by my brother Osler, but after giving the matter the best consideration in my power, I am unable to arrive at the same conclusions which he has come to upon the evidence, and if this case should be carried further, I trust that his view of the evidence, and not mine, may prevail.

I am unable to agree, in the first place, that the original by-law 169 did not provide sufficient means for the construction of the work then contemplated.

Judgment.

BURTON,
J.A.

The work then contemplated was the construction of a drain through the opening in the Canadian Pacific Railway then existing; that is to say, through a culvert then used as a cattle-pass under the railway, which was presumably assumed to be sufficient; no provision whatever was then made for the stone structure, the expense of constructing which is now the matter in dispute. I understand that the funds on hand were sufficient to complete the excavation through the cattle-pass in the manner first contemplated; but if not, then an additional sum might probably have been raised in the way suggested, but the construction of this stone structure was an afterthought, requiring, in my opinion, a new by-law with the formalities which the law prescribes.

I am very reluctantly compelled to agree with the judgments of the Courts below and to hold that the appeal must be dismissed.

MACLENNAN, J. A. :—

The defence set up in this action is that the covenant sued on was beyond the power of the defendants to make. The work done by the plaintiffs, which the defendants covenanted to pay for, was the construction of a stone culvert across the plaintiffs' railway, through which a drain was to pass which the defendants had under construction. There had been a drain some time before 1890, constructed partly in the township of Chatham and partly in the township of Camden, called the Big Creek drain, the outlet of which was found to be insufficient. Thereupon, a petition for an improved outlet was presented to the township of Chatham by ratepayers along the course of the drain, and the usual proceedings were taken thereon, namely, a report and assessment by an engineer, etc., and finally a by-law to assess and raise the money and to

Judgment, enter into a contract for the performance of the work. The work thus provided for was earth excavation and the making of a bridge on a highway. There was no provision whatever for the making of a culvert across the railway. There was a cattle-pass across the railway, and the report and by-law provided for the excavation being made through that cattle-pass. It was contended that inasmuch as it turned out that the excavation could not be effectively made through the cattle-pass without a reconstruction of the culvert, the work and expenditure were authorized by section 573 of the Municipal Act, R. S. O. ch. 184. I think it is perfectly clear that section 573 is inapplicable. That section provides for two cases, namely: first, where a by-law has not provided sufficient means, and, secondly, where it has provided more than sufficient means for the completion of the works thereunder. In either case the by-law may be amended, in the first case to increase and the other to reduce the sum to be levied to conform to the actual cost of the works. The section has no application to a case like the present where the works authorized by the by-law have been found insufficient or ineffective for the purpose intended. For such a case other sections have to be resorted to, namely, section 585 and relative sections. The difficulty, however, in the present case is that section 585 merely dispenses with a petition, and requires, as in other cases, the report of an engineer or surveyor before undertaking the proposed work, and there was no such report, nor were there any proceedings under sections 569 to 582, inclusive, as required by the Act.

It was contended further, that the action of the council might be supported by section 592, but I do not think that helps the appellants, but the reverse, for, it shews how careful the Legislature is that no work of drainage shall be undertaken without observing the formalities required for ascertaining and assessing for their proportions of the cost the land to be benefited.

I am, therefore, of opinion that the covenant in question was not one which the defendant corporation had author-

ity to enter into and that it is void. I do not think the case at all governed by *Bernardin v. North Dufferin*, 19 S. C. R. 581. If the corporation had qualified itself for getting this work done by taking all the preliminary steps prescribed by the Municipal Act, and if what was lacking was merely a by-law authorizing the execution of the contract, then it would have been necessary to consider the application of that case. As the matter stands, however, I think it is governed by *Mann v. Edinburgh Northern Tramways Co.*, [1893] A. C. 69. The defendants had no power to do this work as a township work. They could only do it as a work for the benefit of a limited area partly within their own township and partly within the limits of another township, and to be assessed against and to be paid for by the ratepayers of that area. That being so, I think the covenant is invalid and that the judgment ought to be affirmed.

Judgment.

MACLENNAN,
J.A.

OSLER, J. A.:—

The evidence, in my opinion, establishes the following facts:—

1. That the original by-law 169 of 7th October, 1890, did not provide sufficient means for the construction of the contemplated work.

2. That the by-law was acted upon before the negotiations between these litigants began, by the construction of the works thereby authorized, from the Big Creek drain to the railway lands, and from thence to the river, leaving the connection through the railway lands incomplete.

3. That without the construction of a culvert, or some connection other than the then existing cattle-pass or opening through the railway lands, the contemplated work would be and in fact was useless, incomplete and a cause of damage to adjoining owners, and that some such work was contemplated, though no sufficient means was provided for it by the by-law owing to the omission of the engineer in making his report.

Judgment.

OSLER,
J.A.

4. That the work undertaken under the by-law was not, as seems to be assumed in some of the judgments in the Court below, fully completed at the time when the township procured the railway company to enter into an agreement with them for the construction of the work through their land necessary to complete it.

5. That the work done by the railway company, for the balance of the cost of which this action is brought, was so done at the request of the defendants and pursuant to an agreement between the plaintiffs and the defendants, purporting to be duly executed by the defendants, and was so done for the purpose of completing the work contemplated by the by-law and in order fully to carry out the intention thereof.

6. That the said agreement was not made, nor the execution of that part of the said work therein provided for and contemplated by said by-law, under the authority of any by-law other than by-law 169, clause 5 thereof.

And lastly : That the work so done by the plaintiffs was accepted by the defendants as part of the works contemplated by the by-law and as completing the same.

On this state of facts I am, with all respect to those from whom I differ, of opinion that the plaintiffs are entitled to a judgment for their claim, viz., \$2,004.85. It was not denied before us that the council had entered into a formal agreement duly executed by them with the defendants, and, therefore, I do not enter into an examination of the evidence on that head. No doubt all parties concerned for the defendants were well advised in abstaining from pressing that point, and relying wholly on the absence of a by-law or of statutory authority to incur the debt. So far as regards merely the absence of a by-law to authorize the execution of the agreement, the work having been done in fact by the plaintiffs, and accepted in fact by the defendants, and being work necessary for the completion of a township work, I think the case comes within the authority of *Bernardin v. North Dufferin*, 19 S. C. R. 581.

But I do not see why the contract may not fairly be considered as one authorized by the construction by-law. The contemplated work was to be done for the purpose of completing the works authorized by that by-law, and it was not important whether they were carried out under one contract or several. Either way the plaintiffs ought to have judgment. It will be time enough to meet any difficulties in the way of working it out when they arise. At present I will only say that I am not convinced that section 573 may not be found to apply even if the judgment is not to be regarded as a general judgment against the township. In *Sombra v. Chatham*, 21 S. C. R. 305, the fact that two townships were interested in the work appears not to have been thought an insuperable obstacle to its application.

Judgment.

OSLER,
J.A.

Appeal dismissed with costs,
OSLER, J. A., *dissenting.*

THE CORPORATION OF THE CITY OF ST. THOMAS V.
YEARSLEY.

Duress—Bond—Illegality—R. S. O. ch. 234.

A bond to secure the payment of the cost of maintaining at an industrial school a boy under fourteen years of age, convicted of larceny, and who otherwise came within the requirements of section 7 of the Act respecting Industrial Schools, given in consequence of the Judge's statement that in default the boy would be sent to the reformatory, is void, this being in law duress.

Per OSLER, J.A.:—The bond was also illegal and void on the ground that not being required by law it was given in order that the law might be put in force, which ought to have been put in force and acted upon without it.

Judgment of the County Court of Elgin reversed, HAGARTY, C.J.O., dissenting.

Statement. THIS was an appeal by the defendants from the judgment of the County Court of Elgin.

The action was brought to recover \$160.16, upon a bond made by the defendants, conditioned to be void on payment by the defendant Joseph W. Yearsley to the head master of the Victoria Industrial School of charges for the maintenance of Albert Yearsley, his son. On the 20th of April, 1891, Albert Yearsley was convicted of larceny by the Junior Judge of the County Court at St. Thomas and the Judge intimated that he intended to sentence him to a term of imprisonment in the Reformatory for Boys at Penetanguishene. The mother of the boy, who was present in Court, asked that he should instead be sent to the Victoria Industrial School at Mimico and the Judge, as a condition of sending him to the school instead of to the reformatory, required the bond in question to be entered into. The defendants contended that in thus making the bond they were acting under duress and that the bond was therefore void.

The action was tried on the 2nd of October, 1894, before His Honour Judge Hughes, who subsequently gave judgment in favour of the plaintiffs.

The defendants appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 15th of May, 1895.

O. A. Howland, and *T. W. Crothers*, for the appellants. *Argument.*
N. Macdonald, for the respondents.

Several questions were argued as to the constitution of the action and the nature of the relief asked, but the main objection to the judgment was that already referred to, namely, that the circumstances amounted to duress in law, and on this point *Williams v. Bayley*, L. R. 1 H. L. 200, was relied on.

June 25th, 1895. OSLER, J. A. :—

This is an appeal by the defendants from the judgment of the County Judge of the county of Elgin in an action upon a bond made by the defendants to the plaintiffs. The bond bears date 24th April, 1891, and the defendants thereby became bound to the head master of the Industrial School at Mimico, and to the plaintiff corporation, in the sum of \$200 : the condition of the bond being that if Yearsley should pay to the head master of the school "all charges for the maintenance of his son, A. W. Yearsley, during the term he has been committed to the said school until he arrives at the age of sixteen years, and indemnifies and saves harmless the said corporation of the city of St. Thomas from the payment of all charges for the maintenance of the said son at school," then the obligation to be void, etc.

The defendants pleaded that the bond was illegal and void under the circumstances in which it was given: that it was executed upon a misrepresentation of the facts, and that they were not, in giving it, acting voluntarily, or as free agents.

It appeared that the son of the defendant Yearsley, a boy of thirteen years of age, had been committed for trial for a petty theft, and that he had been brought before the Judge of the County Court under the provisions of the Speedy Trials Act and of the Act respecting the County Judges' Criminal Court. On the 20th of April, 1891, he was

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OSLER,
J.A.

brought before the Judge, consented to be tried without a jury, pleaded guilty to the charge, and was convicted. On this conviction he would have been sent to the reformatory at Penetanguishene, a consequence which his parents were anxious to avoid, thinking that he was more a fit subject for the Industrial School and that the disgrace of a confinement there would be less. The boy's mother made the necessary statement as to age, etc, but the Judge would only make the order of committal to the school upon the bond now in question being furnished. The Judge's evidence on the present trial was as follows: "She, *i.e.*, the mother, made out a case that the boy was incorrigible, that he was only just past the age of thirteen [see the Act of 1890, 53 Vict. ch. 76 (O.)] and he was properly brought within my discretion. He was let go on suspended sentence on the charge of larceny, and it was understood that he was to be dealt with under his mother's information. I do not recollect that I said if she did not give a bond he would be sent to Penetanguishene. I suppose I made it (*i.e.* the giving of the bond) a condition that he should be sent to Mimico. I suppose I would have sent him to Penetanguishene if he had not been sent to Mimico. He was sent for a year to Mimico at first, but they would not keep him for less than until he was sixteen years of age (*i.e.* for a three years' sentence). I knew his father could not pay that (*i.e.* the cost of keeping him there) and that it was necessary to send him there. It was a favour his being sent there."

The Act respecting Industrial Schools, R. S. O. ch. 234, enacts—section 7—that any person may bring before the judge of the county court any child apparently under the age of fourteen years who comes within any of the following descriptions:—

(4) Whose parent represents to the judge that he is unable to control the child and desires him to be sent to an industrial school under the Act.

(6) Who has been found guilty of petty crime, and who, in the opinion of the judge before whom he has been con-

victed, should be sent to an industrial school instead of to a gaol or reformatory.

Judgment.

The child in question came within both these descriptions.

*OSLER,
J.A.*

Section 9 provides that if the judge is satisfied on inquiry that it is expedient to deal with the child under the Act he may order it to be sent to a certified industrial school to be named in the order for such time as he thinks proper not extending beyond the time when it will attain the age of sixteen years.

Section 22 enacts that on the complaint of the school corporation during the detention of a child in a certified industrial school, the judge of the division court in which the parent of the child resides may, on summons issued and served according to the usual practice of the court, examine into his ability to maintain the child and may, if he thinks fit, make an order on the parent for the payment to the school corporation of such weekly sum, not exceeding \$1.50 per week, as to the judge seems reasonable, during the whole or any part of the time during which the child is liable to be detained, etc., etc.

This order (section 23) may be varied from time to time as circumstances require, on the application of either party.

Section 25 provides, sub-section (1), that if the child has not resided for a year in the city or town in which the school is situated or to which it is attached, but has resided for that period in some other county, city or separated town, the school corporation may recover from the corporation of such municipality the expense of maintaining the child.

Sub-section (2): Though the child may have resided for a year in the city to which the school is attached, or is situate, if it has since such residence been resident for a year in some other municipality the school may recover the expense of maintenance from the county, city or town, in which the child last resided for a period of one year.

Sub-section (3): When the child resided for one year

Judgment. last preceding its admission to the school in the city, etc.,
OSLER, in which the school is situate, etc., such city, etc., shall pay
J.A. a sum of not less than \$1.50 per week towards the expenses
of maintaining in the school each child whose maintenance
is not otherwise fully provided for, and such city or town
shall have the power to recover the amount so paid from
the parents if able to pay it.

The Act of 1888, 51 Vict. ch. 40, sec. 6 (O.), enacts that the municipality in which the child is resident at the time of the committal shall be liable for the maintenance of the child to an extent not exceeding \$2 per week. The judge's certificate as to the residence of the child shall be sufficient *prima facie* evidence thereof.

There is no reference in this Act to any of the provisions as to maintenance in the former Act, possibly because it may have been thought that section 6 would not be applicable to all the classes or descriptions of children mentioned in section 7 of that Act.

The Judge made an order, reciting that having satisfied himself upon inquiry that it was expedient for him to deal with the child, being a child under the age of fourteen years, under the Industrial Schools Act, that he should be sent to the Industrial School at Mimico, there to be detained for a period of thirty-five months. By the same order he further certified "that under the provisions of section 25 of the said Act, the municipality of the city of St. Thomas is liable for the maintenance of the said child, unless otherwise provided for."

This part of the order was not authorized by section 25 of the Industrial Schools Act, nor is it such a certificate as is provided for by section 6 of the Act of 1888, which must be confined to a statement as to the residence of the child.

We are dealing with a public Act or Acts passed for the benefit of certain specified descriptions of children, in respect of whom a discretion is vested in the judges and magistrates, or other persons mentioned in the Acts, to send them to a certified industrial school. Their parents

or guardians may be quite unable to support them, but the Legislature has not deemed that any reason why they should be deprived of the advantages afforded by the school. It is right that they should support them if they are able to do so, but if they cannot the country at large or the local municipality must do so, and the Legislature has accordingly made special provisions on the subject by which the cost of maintenance within certain limits may be recovered, under specified circumstances, from the parent, step-parent, guardian, and municipality. Nowhere in the Act will it be found that the exercise of the judicial discretion in respect of the child is dependent in any way or to any extent upon the ability of the parent or guardian to pay the expense of its maintenance.

Judgment.

OSLER,
J.A.

The learned Judge in this case found that the child ought to be dealt with under the Act, and accordingly he ought to have so dealt with it irrespective of any consideration as to how the expense of its maintenance at the school would be met. If not provided for by the Act it was not a matter with which he need have concerned himself. His duty was performed in sending the child to the school when he came to the conclusion that it ought to be dealt with under the Act. Therefore, in my opinion, he had no right to impose upon or exact from the parent, as a condition of the exercise of his discretion, that he should give a bond himself, and much less that, being himself unable to pay, he should give a bond with a surety to pay the expense of the maintenance of the child at the school. The bond, therefore, in my opinion, is illegal and void, on the plain ground that, not being required by law, it was given in order that the law might be put in force, which ought to have been put in force and acted upon without it. It is void, I think, also upon the further ground that the parents, being desirous of having their child dealt with under the Act and the case being one coming within the Act, were compelled to procure it, the alternative practically being that the child could have been sent to the reformatory, being just within the reformatory

Judgment.

OSLER,
J.A.

age. Under such circumstances, I do not see how the obligors can be said to have been free and voluntary agents in giving the security.

I desire to make no reflection upon the learned Judge, who was, no doubt, under the impression that he was acting in the best interests of all parties, but I am obliged to say that I regard the instrument so obtained as one that cannot be and ought not to be enforced, and therefore that this appeal should be allowed.

MACLENNAN, J. A. :—

I think this appeal must be allowed. I do not think the learned Junior Judge had any power to require the defendant Yearsley to enter into the bond in question, which is to pay the school all charges for his son's maintenance, and to indemnify the plaintiff corporation against them during the period of his committal, and until he should arrive at the age of sixteen years.

The learned Senior Judge, in the judgment now in review, relies on the powers under sections 22, 23 and 25 of the Act respecting Industrial Schools, R.S.O. ch. 234, as shewing that the father was or might be made liable for such maintenance. But the liability under section 22 is made to depend on ability to pay, and the discretion of the judge, after examination into that question, and is only to the school, and is limited to \$1.50 per week; whereas the liability of the municipality is absolute, and in the present case, which is under section 25, sub-section 1, of the principal Act, or under section 6 of 51 Vict. ch. 40 (O.), the amending Act, is unlimited in amount; and there is no right of claiming reimbursement from the parents given by either Act. I therefore think the learned Judge was wrong in supposing that he had the power to require the father to give this bond.

That being so, the further question is whether there is any ground on which the defendants can be relieved from it.

[The learned Judge stated the facts and continued:]

It is evident from the whole case that the learned Judge acted with perfect propriety, as well as with humanity, in doing what he did. Sections 32 and 33 of the Dominion Act, 53 Vict. ch. 37 (now Appendix to the Criminal Code, p. 491), make provision for sending boys who have been convicted of theft to an industrial school instead of to a reformatory; but it does not appear that the Mimico school had published the notice required by those sections. See also the Ontario Acts, 53 Vict. ch. 75 and ch. 76.

Judgment.

 MACLENNAN,
 J.A.

The situation, therefore, was this: It was entirely proper to send the boy to Mimico instead of to Penetanguishene, and the learned Judge determined to do so, but he required the boy's father, the defendant, to give the city a bond of indemnity. It is plain that the defendant supposed that unless he gave the bond his boy would be sent to Penetanguishene, and he gave it to prevent that alternative. I am unable to distinguish this case from *Williams v. Bayley*, L. R. 1 H. L. 200. If the learned Judge, or his own solicitor, had said to the defendant, "Your boy is going to be sent to Mimico in any case, and not to Penetanguishene. You need not give a bond, and it will make no difference to the boy whether you do or not, nevertheless he is your boy, and you ought to pay for his maintenance," and if, knowing all that, he had given the bond, I do not see any ground on which he could be relieved from it. But the actual case is very different. He thought he must either give the bond or suffer the disgrace for the boy and himself of imprisonment. If it had been left to his own volition to sign the bond or not, he might or might not have done so; but, as it was presented to him, he had no choice. There was a pressure put upon him to which he ought not to have been subjected, and I am therefore of opinion that he is not bound by the bond and ought to be relieved from it.

BURTON, J. A. :—

I am of the same opinion.

Judgment. HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.

I regret that I am not able to take the same view. To my mind there was nothing illegal about the matter. The commitment was valid, and it was natural and proper to require the bond to be given as security for the payment of maintenance.

Appeal allowed with costs,
HAGARTY, C. J. O., *dissenting.*

CHURCH V. THE CORPORATION OF THE CITY OF OTTAWA.

Damages—Inadequacy of—Negligence—New Trial.

Statement. THIS was an appeal by the defendants from the judgment of the Chancery Division, reported 25 O. R. 298, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 31st of May, 1895.

Aylesworth, Q. C., for the appellants.

W. R. Riddell, and H. E. Rose, for the plaintiff.

G. E. Kidd, for the third party.

June 25th, 1895. The appeal was dismissed with costs.

THE ONTARIO INDUSTRIAL LOAN AND INVESTMENT
COMPANY V. O'DEA.*Landlord and Tenant—Lease—Surrender in Law.*

Acts relied on as shewing the acceptance by the landlord of the surrender of a lease and as effecting a surrender by operation of law must be such as are not consistent with the continuance of the term; and using the key left by the tenants at the landlords' office, putting up a notice that the premises are "to let," making some trifling repairs, and cleaning the premises are ambiguous acts which are not sufficient for this purpose. Judgment of the County Court of York affirmed.

THIS was an appeal by the defendants from the judgment of the County Court of York. Statement.

The action was brought to recover \$275, rent of part of the premises known as The Toronto Arcade, from the 1st of September, 1893, to the 1st of March, 1894. So far as it is necessary to state them, the facts were that the defendants were tenants from year to year and gave to the plaintiffs some time before the 1st of September, 1893, notice of their intention to quit, this notice being, however, defective. They paid rent up to the 1st of September, 1893, and handed the key of the rooms in question to the plaintiffs' bookkeeper. A fortnight after this, the plaintiffs wrote to them declining to accept the premises but offering, if a satisfactory tenant could be obtained at an early date, to release the defendants for the unexpired portion of the term. Of this letter the defendants took no notice. Before the defendants left the premises they had asked the plaintiffs to make some small repairs. After the defendants left, the plaintiffs put up notices that the rooms were "to let," and put a notice to the same effect on the directory board of the building. They also had the rooms cleaned and made the trifling repairs that were required. After this they brought this action, which was tried on the 15th of October, 1894, before His Honour Judge McDougall, who subsequently gave judgment in favour of the plaintiffs.

Argument. The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 7th of June, 1895.

J. J. Warren, for the appellants. The acts of the plaintiffs in accepting the key with payment in full of the rent to date, in entering on the premises and taking possession and using the key, in putting up notices that the premises were to let, and in repairing the premises, are sufficient to shew that the plaintiffs looked upon the term as being at an end and operate in law as an acceptance of a surrender of the term: *Phene v. Popplewell*, 12 C. B. N. S. 334; *Smith v. Roberts*, 9 Times L. R. 77; *Doe v. Denison*, 8 U. C. R. 185; *Acheson v. McMurray*, 41 U. C. R. 484; *Ramsay v. Stafford*, 28 C. P. 229; *Nixon v. Maltby*, 7 A. R. 371; *Gault v. Shepard*, 14 A. R. 203.

H. A. E. Kent, for the respondents. The acts mentioned are all consistent with the continuance of the tenancy and are not sufficient to effect a surrender by operation of law: *Oastler v. Henderson*, 2 Q. B. D. 575; *Smith v. Blackmore*, 1 Times L. R. 267; *Cannan v. Hartley*, 9 C. B. 634; *Jones v. Bridgman*, 39 L. T. N. S. 500; *Bird v. Defonvielle*, 2 C. & K. 415.

J. J. Warren, in reply.

June 25th, 1895. HAGARTY, C. J. O. :—

The learned Judge held that the defendants were liable after reviewing the authorities, and chiefly relying on the case of *Oastler v. Henderson* 2 Q. B. D. 575.

I cannot hold that the learned Judge was wrong in so holding, and I think that the defendants' liability remained.

I do not think that the facts in evidence warrant the conclusion that the landlords accepted the surrender, or that there was a surrender in law. Almost immediately after the defendants left the place the plaintiffs notified them that they held them liable, but were willing if a tenant

could be got to discharge them from further liability. I cannot think that a landlord by merely advertising the place for tenancy can strictly be considered as accepting a surrender. His leasing to another would so operate. Nor do I think the cleaning up of the premises or repairing plaster, etc., would have such effect.

In *Oastler v. Henderson*, 2 Q. B. D. 575, the facts were somewhat stronger than here, as to the landlord's repairs, and the fact of two of his workmen occupying two of the rooms.

The general law is fully discussed in the judgment of this Court in *Gault v. Shephard*, 14 A. R. 203, delivered by my brother Osler, in which the cases are reviewed, and *Oastler v. Henderson*, discussed, and the summary of Brett, J., quoted at p. 207. The fact of repairs is noticed as being done "not with a view of resuming possession of the property, but of protecting it."

In Woodfall's Law of Landlord and Tenant, 13th ed., p. 303, it is laid down that the tenant merely sending the key to the landlord or his agent without further communication does not amount to surrender. If the key is accepted on an understanding that the tenant shall leave, and do so leave, and that rent shall cease, that may be sufficient: see also Redman and Lyon's Law of Landlord and Tenant, 4th ed., p. 353.

In *Smith v. Roberts*, 9 Times L. R. 77, it was held that a surrender in law was to be assumed. The Court of Appeal affirmed the view of Denman, J. The County Council served a notice that the outer walls were in a dangerous state, and an order was made on the landlord to execute the repairs required. He applied to the defendant, the tenant, for permission to send workmen to do the repairs. She replied that she could not prevent it, but would not consent, and would treat it as a disturbance; next day she withdrew her assistants and furniture, and her solicitors sent the key to the plaintiff saying that her holding was determined. He wrote back refusing to accept the determination, but he kept the key to allow his

Judgment.
HAGARTY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

workmen to enter to repair, and he also did some repairs not required by the order. The work while being done rendered three of the rooms unfit for occupation. The landlord (as the learned Judge found) considered himself in full possession and at liberty to take his own time and mode of complying with the order without reference to the tenant's convenience. She left on the 5th March, and the premises were unfit for occupation till some time in May. The Court of Appeal agreed with his finding, Lord Esher observing that the doing the repairs rendered the house uninhabitable, and the facts "looked very like an eviction." This case is very important on the question as to repairs.

I think the appeal must be dismissed.

OSLER, J. A. :—

The judgment of the County Court must be affirmed.

Clearly the defendants were tenants from year to year; the year expiring on the 31st August.

They gave a notice to quit, which was insufficient, namely a six months' notice expiring on a day named, which was a month before the termination of their tenancy. To this notice the plaintiffs paid no attention. But on the 25th July, when the defendants wrote them to say that they had made arrangements with a new landlord and would vacate the premises they then occupied "at the end of the current term (August) as per notice given you last December," the plaintiffs answered by pointing out that this notice was defective and of no value. It stated that the defendants would vacate their premises on the 31st July; whereas the term expired at the end of August, as the defendants accurately said, though too late to be of any use to them, in their letter of the 25th July.

I see no evidence from which it can be inferred that the plaintiffs allowed the defendants to suppose they had accepted the notice to quit as a good notice, at any time during the currency of the half year: *General Assurance Co. v. Worsley*, 15 R. (May) 357.

After this the defendants on the 31st August, as nearly as I can make it out, having paid the rent due up to that time, left the key of the premises with a clerk in the plaintiffs' office, and the plaintiffs thereafter did some trifling repairs, put up a notice on the window that the premises were to be let, and a similar one on the directory board on the outside of the buildings in the space where the defendants' names had theretofore appeared. On the 15th September, a letter was written to them by the plaintiffs' secretary stating that the matter of their tenancy had been before the directors at the last meeting and that they had declined to release the defendants from their liability for the accruing rent for the premises and again pointing out that the notice to quit was defective, but saying that if a satisfactory tenant should be obtained the company would of course be willing to release the defendants for the rent for the unoccupied term.

Judgment.

OSLER,
J.A.

I see no other important facts disclosed in the evidence.

We cannot hold that any or all of them taken together are sufficient to estop the landlords from denying that the term was at an end, and that there was a surrender in law of the tenancy. They are all consistent with the continuance of the lease, and do not amount to that virtual taking of possession by the landlord, spoken of in some of the cases, with the intention of putting an end to the lease, and of which *Smith v. Roberts*, 9 Times L.R. 77, is an illustration, where the repairs done by the landlord upon the demised premises, and the time during which his interference with the occupation of the tenant was prolonged, were held to be wholly inconsistent with any other view than that he had entered as owner intending to accept the surrender of the tenancy.

We have had occasion to consider the question in this Court on at least two occasions: *Nixon v. Maltby*, 7 A. R. 371, and *Gault v. Shepard*, 14 A. R. 203. In both of them the law as laid down in *Oastler v. Henderson*, 2 Q. B. D. 575, was applied. There the acts of the landlord relied upon as putting an end to the tenancy were much stronger

Judgment.

OWEN,
J.A.

and more significant than those we have to deal with in the present case. Something must be shewn to have taken place which is inconsistent with the continuance of the lease, something which raises an estoppel against the landlord and tenant to assert it, in order to effect a surrender in law. Such would be the old lessee assenting to a lease to a new tenant and giving up his own possession to him, or the landlord entering with his assent and taking and retaining possession. Most of the familiar authorities, such as *Thomas v. Cook*, 2 B. & Ald. 119; *Lyon v. Reed*, 13 M. & W. 285; *Davison v. Guest*, 1 H. & N. 744, are referred to and commented on in the recent case of *Wallis v. Hinde*, [1893] 2 Ch. 75. See also *Creagh v. Blood*, 3 Jo. & Lat. 133, at p. 160; *Jones v. Bridgman*, 39 L. T. N. S. 500.

MACLENNAN, J. A. :—

I would gladly relieve the appellants from this judgment if I could, for I think they might well have supposed that after they paid rent to the 31st of August, and gave up the key, they were under no further liability as tenants. But the case of *Oustler v. Henderson*, 2 Q. B. D. 575, referred to in the judgment, being a decision of the Court of Appeal in England, I think leaves us no alternative but to dismiss this appeal. That case was very much like the present, in one respect a stronger case for surrender than the present, inasmuch as there the landlord had allowed some of his workmen actually to occupy part of the premises for the purpose of the landlord's business, which was that of a saddler. By the 3rd section of the Statute of Frauds no leases for years or any uncertain interest in lands or hereditaments shall be surrendered unless by deed or in writing, or by act and operation of law. There was here neither deed nor writing, and the only question is whether there was a surrender by operation of law. This last kind of surrender has been defined as "a surrender effected by the construction put by the Courts on the acts of the parties, in order to give to those acts the effect sub-

stantially intended by them; and when the Courts see that the acts of the parties cannot have any operation, except by holding that a surrender has taken place, they hold it to have taken place accordingly": *per* Brady, C. B.: *Lynch v. Lynch*, 6 Ir. L. R. 131, at p. 138 (1843). A mere verbal agreement therefore, however clear and distinct, is not sufficient; nor does even an actual cancellation of a lease by both parties put an end to the term: *Ward v. Lumley*, 5 H. & N. 87; *Doe v. Thomas*, 9 B. & C. 288; see another definition by Parke, B.: *Lyon v. Reed*, 13 M. & W. 285, at pp. 306, 309. See also Leith's Real Property Statutes, pp. 58, 63, 64; *Cannan v. Hartley*, 9 C. B. 634. These authorities shew that nothing that was done between the parties here was so inconsistent with the continuance of the tenancy that the only inference to be drawn therefrom was that a surrender of the term had been made and accepted.

Judgment.
 MACLENNAN,
 J.A.

The appeal must therefore be dismissed.

BURTON, J. A.:—

I agree.

Appeal dismissed with costs.

ROBERTSON V. BURRILL.

Statute of Limitations—Acknowledgment—Administration.

An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person who is entitled to take out letters of administration to the creditor's estate and who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within the Statute of Limitations.

Judgment of the County Court of Bruce affirmed, MACLENNAN, J.A., dissenting.

Statement. THIS was an appeal by the defendant from the judgment of the County Court of Bruce.

The action was brought by the plaintiff, as administrator of the estate of his wife, formerly Agnes Rae, on a promissory note for \$400, dated 10th January, 1887, made by the defendant in favour of the intestate, payable twelve months after date.

The defence was the Statute of Limitations.

In March, 1888, the defendant paid on account of principal \$200 and one year's interest up to the 10th of January, 1888.

The intestate afterwards intermarried with the plaintiff and died.

On the 5th of February, 1894, the plaintiff wrote to the defendant as follows :—" As the time of the year has come round for an instalment to be paid on our farm, and as I have your note I thought I would write to see if you could let me have the money. Would you send me word if you could oblige me in this matter ?"

The defendant's daughter, by his authority, as the learned Judge found, answered on the 17th of February :—" You wrote about the money that Pa owed Aunt Agnes. Would you please send the exact amount and the length of time. As far as the money is concerned, Pa is quite willing to pay it, as he will have to pay it anyway. Aunt Agnes' family claim one-half of the note, and they are quite willing to settle it without any trouble. If you are willing to take your share it will be all right. The family have noti-

fied me not to pay more than one-half to you. If you are willing to do this, Pa will send you a cheque for half the money; if not, you will have to take out a letter of administration and administer to it. We do not want to have any trouble about it, and I think it best to settle it for both parties." Statement.

The plaintiff replied on the 24th of February:—"As regards the note, I was glad to see that the family was willing to settle without trouble. Well, so am I. I would be only too glad to accept your offer of one-half, but that would be too much, as Agnes had incurred an indebtedness which at the time of her death had not been settled, but as the debt is to another member of the family it will have to be paid out of the note first and then a divide made. As all there is to divide is not much, I think if the family would appoint one of themselves to act on behalf of all, we could meet and settle the matter. I think we can easily settle matters without going to the expense of taking out letters of administration."

The answer to this letter was written by the defendant's wife, but there was some doubt whether it was by his authority. Both of them denied that it was written with his authority, and there was no finding on that point.

On the 19th of April, 1894, letters of administration to his wife's estate were granted to the plaintiff by the Surrogate Court of Bruce, and this action was commenced on the 23rd of June, 1894. It was tried before His Honour Judge Barrett, who, on the 24th of January, 1895, gave judgment in the plaintiff's favour.

The defendant appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 21st of May, 1895.

H. P. O'Connor, Q. C., for the appellant. At the time the letter in question was written the plaintiff had no interest in the note. The letter was therefore at most an acknowledgment to a third person, which is not sufficient: *Good-*

Argument. *man v. Boyes*, 17 A. R. 528; *Stamford Banking Co. v. Smith*, [1892] 1 Q. B. 765.

D. Robertson, for the respondent. The acknowledgment was made to the person entitled in fact to enforce payment of the note, and the necessary legal status subsequently acquired relates back to the time of the intestate's death, so that the acknowledgment was sufficient: *Trice v. Robinson*, 16 O. R. 433; *Edinburgh Life Assurance Co. v. Allen*, 19 Gr. 593; *Christie v. Clark*, 27 U. C. R. 21. The plaintiff would have been entitled to commence the action before the issue of letters of administration, making his title complete before judgment. Here in the same way the acknowledgment is made available by the taking out of letters before the time for acting on the acknowledgment arrived. The plaintiff had the first right to take out the letters, and the acknowledgment to him is sufficient: *Clark v. Hooper*, 10 Bing. 480. *Stamford Banking Co. v. Smith*, [1892] 1 Q. B. 765, turns on the fact that there was no inference of intention to pay. See also *Roblin v. McMahon*, 18 O. R. 219; *Green v. Humphreys*, 26 Ch. D. 474. The letter was more than a mere acknowledgment; it was an agreement to pay to the person who might take out letters of administration.

H. P. O'Connor, Q. C., in reply.

June 25th, 1895. OSLER, J. A. :—

The question is whether the letter of the 17th of February, 1894, can be treated as an acknowledgment sufficient to take the case out of the statute, the plaintiff not having been then appointed administrator of the estate of the payee.

The letter contains an absolute admission of the writer's indebtedness on the note, from which a promise to pay may naturally be inferred: *Green v. Humphreys*, 26 Ch. D. 474; so that the only question is whether the plaintiff, having now become administrator, can take advantage of it. I think he can.

Judgment.

OSLER,
J.A.

In *Clark v. Hooper*, 10 Bing. 480, (more fully reported in 3 L. J. C. P. N. S. 159; and elsewhere, though all the reports are obscure), payment of interest to a person acting as and supposed to be the rightful administrator of an intestate upon a note made to the intestate, was held to be a good payment to take it out of the statute in favour of the person who subsequently became the proper personal representative. Of this case it is said by Lord Herschell in *Stamford Banking Co. v. Smith*, [1892] 1 Q. B. 765, 40 W. R. 355: "There may be an exception to the rule (that the acknowledgment or payment cannot be made to a third person, but must be made to the creditor or his agent) in the case of a payment made to a person filling a representative capacity; * * in such a case the payment might enure for the benefit of the persons for whose benefit it was believed to be made. This would support the decision in *Clark v. Hooper*. The payment there was made to the administratrix in her representative capacity, * * and when a proper administration was taken out the administratrix would be able to take advantage of the payment. Unless *Clark v. Hooper* can be supported on that ground, I do not think it can be supported consistently with other decisions. At the time when the payment was made there was no other representative of the estate, there was no other person to whom the payment could have been made, and the intention of the debtor was to make the payment to the estate, not to the individual who received it."

Bodger v. Arch, 10 Exch. 333, not cited on the argument, is in point. That was an action on a promissory note, of which at the time of his marriage the plaintiff's wife was the holder. At her death the plaintiff claimed the note as her representative, and it was arranged between him and the defendant that the interest accruing thereon should be retained and applied by the defendant in a certain manner. This was done for many years, and within six years before action brought an endorsement was made upon the note and signed by the defendant to the effect

Judgment.

OSLER,
J.A.

that all interest upon the note was then paid. Letters of administration to the wife's estate were afterwards granted to the plaintiff, who then sued the defendant. It was held that the arrangement as to the application of the interest was a sufficient payment of interest within the Act, and that the contract respecting it being made with a person acting on behalf of the intestate's estate and for its benefit, the administration had relation back to what had been done after the death of the intestate and before the grant of letters of administration; so as to entitle the plaintiff to sue as administrator.

In argument, counsel (Willes and Lush) say: "Suppose that before administration the defendant had paid to the plaintiff a sum of money on account of the note, and that after administration the plaintiff had sued the defendant for the whole, could not that payment have been pleaded in bar?"

In giving judgment, Parke, B., adopts the argument: "Suppose an actual promise to have been made to the plaintiff before he was administrator, and within six years, either in writing or accompanied by a part payment of principal or interest, we have no doubt the action would have been maintainable. It would have constituted a new contract with the plaintiff as administrator, founded on the consideration of the old debt; and this is the true nature of every case which is said to be taken out of the operation of the statute by a new promise; and this being a contract with a person acting on behalf of the intestate's estate, and not on his own account, the administration would have relation back in order not to lose the benefit of that contract, upon the same principle that an action of trover is maintainable for the conversion of goods of an intestate after his death and before the grant of administration, and that an action of *assumpsit* by an administrator as such will lie on a contract of sale of goods of the intestate by a person meaning to act as agent for the benefit of the estate between the death and grant of administration: *Foster v. Bates*, 12 M. & W. 226."

These cases are cited in the last edition (9th) of Williams' Law of Executors, vol. 1, p. 553. And see *Baker v. Blaker*, 55 L. T. N. S. 723, *per* Kay, J.: "The law is that, if after death of an intestate, and before letters of administration to the intestate's estate have been taken out, some one acting avowedly on account of the estate of the intestate enters into a contract, * * the administrator may adopt that contract and ratify what has been done under it. This is so, because the title of the administrator, although it does not exist until the grant of administration, relates back to the time of the death of the intestate." See also *Thomson v. Harding*, 2 E. & B. 630; *Christie v. Clark*, 27 U. C. R. 21; *Edinburgh Life Assurance Co. v. Allen*, 19 Gr. 593; Darby and Bosanquet's Statutes of Limitations, 2nd ed., p. 116.

Judgment.

OSLER,
J.A.

In re Watson, 19 Q. B. D. 234, should be noticed. It is, however, quite distinguishable, for there the services rendered by the solicitor and for which he claimed payment from a person who was afterwards appointed administrator, were so rendered, though for the benefit of the estate, at the request of a person who did not subsequently obtain the letters of administration, and the administrator refused to ratify what had been done. There is a dictum by the Master of Rolls, who, speaking for himself only, says he doubts whether Phillips (the administrator) after he became administrator could have ratified a prior contract made with himself. *Bodger v. Arch*, 10 Exch. 333, and other cases there cited, which were not referred to, shew that this is too wide, and the other members of the Court place their decision on the ground that the solicitor's demand was not within the terms of the order for taxation.

In the case at bar, the plaintiff's letters to the defendant of the 5th February and 24th February, 1894, shew that he recognized the note as belonging to his wife's estate, distributable as such among those entitled to it after payment of her debts. And he was prepared as representing the estate to arrange it with all parties interested. He was,

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OSLER,
J.A.

therefore, acting for the estate and not in his own behalf, and the defendant's letter of the 17th February is a plain admission of his liability in terms and an expression of his readiness to pay the whole to the plaintiff so soon as he should obtain letters of administration, he being the proper person to receive the grant thereof. An acknowledgment thus given is for the benefit of the estate, so that the remedy upon the note may not be lost. And upon the principle affirmed in the cases cited the letters of administration have relation back so as to enable the plaintiff to rely upon it and thus to repel the defence of the statute.

The appeal should therefore be dismissed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

MACLENNAN, J. A.:—

I regret to have to come to the conclusion that this appeal ought to be allowed. I think the acknowledgment would have been sufficient if the plaintiff had then been administrator to his wife, but I am unable to come to the conclusion that it had any effect, the plaintiff not having at the time it was made obtained the grant. I have examined all the cases to which we were referred, and I am unable to see how an acknowledgment made before letters granted, on the chance that the person to whom it is made may afterwards become the personal representative, can have any effect. For many purposes, on the ground of necessity, letters of administration are held to relate back to the death, but those cases are exceptions to the general rule, which is that they do not so relate: 1 Williams' Law of Executors, 9th ed., p. 553. Until administration is actually granted it is always uncertain who the administrator may be, and it would be a strange anomaly that the efficacy of an acknowledgment should depend on who the administrator might happen to be. In this case the person to whom the acknowledgment was made was also the person who had the first right to administer, viz., the husband

of the intestate. He was also entitled to a one-half distributive share of the estate, and the letter containing the admission recognizes the plaintiff's right to administer, all which makes the case very strong in favour of the efficacy of the acknowledgment. It might, however, have been that the intestate's estate was insolvent and that creditors were entitled to it all, and so that the plaintiff had in reality no interest whatever. In such a case it might be a creditor to whom administration would ultimately go. I do not see how it could be held that a payment to the husband before administration could be good or would bind the estate, much less a mere acknowledgment. A payment would, of course, be binding on him personally, but if the estate were insolvent it could not be binding on the creditors, who could repudiate the payment and require it to be made again, and that whether the husband or any one else was the administrator: see *Stamford Banking Co. v. Smith*, [1892] 1 Q. B. 765; *In re Watson*, 19 Q. B. D. 234.

Judgment.

MACLENNAN,
J.A.

I do not see how the principle of ratification can be invoked, it being now settled, contrary to the earlier decisions, that a creditor cannot ratify a promise or acknowledgment made to a stranger in order to take the case out of the statute.

I think the appeal must be allowed, and that the action ought to be dismissed.

Appeal dismissed with costs,
MACLENNAN, J. A., *dissenting.*

DUNLOP V. USBORNE AND HIBBERT FARMERS MUTUAL FIRE
INSURANCE CO.

*Insurance—Fire Insurance—Assignment of Part of Insured Property—
Breach of Statutory Conditions.*

Where a policy of insurance in one sum covers buildings and chattels, and the land upon which the buildings stand is conveyed by deed without the consent of the insurers in breach of the fourth statutory condition, the policy is avoided *in toto* and does not remain in force as to the chattels.

Distinction between the breach of that condition and the first condition pointed out.

Gore District Mutual Fire Insurance Co. v. Samo, 2 S. C. R. 411, applied. Judgment of ARMOUR, C.J., reversed.

Statement. THIS was an appeal by the defendants from the judgment of ARMOUR, C. J.

The action was brought upon a policy of insurance for \$2,800 issued by the defendants to one John Dunlop, and alleged to have been assigned by him to the plaintiff with the defendants' consent, insuring a dwelling house and the contents thereof, and a barn and stable and the contents thereof.

After the insurance was effected, and after the alleged transfer of the insurance to the plaintiff, he conveyed the land to John Dunlop under the circumstances set out in the judgment, there being a conflict of evidence as to the acceptance by John Dunlop of the conveyance. The defendants set up a number of defences to the action, including the defence of arson, but the only defence which it is necessary to deal with in the present report was that, by reason of the conveyance of the land to John Dunlop, the insurance, if otherwise valid, had been avoided both as to the buildings and as to their contents.

The action was tried at Goderich on the 16th of March, 1894, before ARMOUR, C.J., who held that there had been a breach of the condition as to assigning, but that the policy was divisible, and that the plaintiff was entitled to recover for the personal property insured.

The defendants appealed, and the appeal was argued **Argument.** before HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A., on the 28th and 29th of May, 1895.

Aylesworth, Q. C., and *W. C. Moscrip*, for the appellants. The principle of *Gore District Mutual Fire Insurance Co. v. Samo*, 2 S. C. R. 411, applies to this case. The policy cannot be treated as a divisible contract, and there having been a breach of the statutory condition by reason of the conveyance of the buildings, the policy is void *in toto*. See also *Harris v. Waterloo Mutual Fire Insurance Co.*, 10 O. R. 718. [The learned counsel then dealt with the other defences.]

Garraw, Q. C., for the respondent. There was, in fact, no breach of the condition, the conveyance not having been accepted, and the plaintiff is entitled to the full amount of the insurance. Even if, however, it is held that there was a conveyance, and there has been, therefore, a breach of the condition as far as the land is concerned, that does not affect the insurance on the chattels. The risk as to them is divisible, and the plaintiff is entitled to recover the insurance upon them: *Phillips v. Grand River Mutual Fire Insurance Co.*, 46 U. C. R. 334; *Goring v. London Mutual Fire Insurance Co.*, 10 O. R. 236. The case of *Gore District Mutual Fire Insurance Co. v. Samo*, 2 S. C. R. 411, is distinguishable. That turned on the question of fraudulent concealment. *Harris v. Waterloo Mutual Fire Insurance Co.*, 10 O. R. 718, also cited by the appellants, turns on another clause of the conditions, viz., that relating to false swearing, which is made fatal to the whole claim by the express wording of the Act.

Aylesworth, Q. C., in reply. *Phillips v. Grand River Mutual Fire Insurance Co.*, 46 U. C. R. 334, deals with the first statutory condition, which refers only to the particular property affected by the breach, while the fourth statutory condition refers to the policy itself.

Judgment. June 25th, 1895. BURTON, J. A. :—

BURTON,
J.A.

I am unable to agree with the learned trial Judge that the secretary-treasurer was the officer of the defendants charged with the duty of issuing policies of insurance. A policy to bind the members could only be issued by authority of the directors, which this was not, and I do not think that the company are estopped from denying its validity because, after the fire, they passed a resolution declining to pay the loss on another ground.

It would, I think, be unfortunate if any company, and more especially a company formed on the mutual plan, where the premium is payable by assessment, could be made liable on a policy issued without the authority of the directors in the irregular way in which this policy was issued.

But I am of opinion that even if validly issued, it was avoided by the alienation of the property without the assent of the company.

The Court of Queen's Bench, so long ago as 1854, held that where, by the terms of a condition upon a policy, it was provided that in case insurance should subsist or be effected on the premises or property insured by the company in any other office during the continuance of such insurance, the policy granted thereon should be void, unless such double insurance subsist with the consent of the directors, that by the terms of the condition and of the statute, the policy was altogether avoided, and not merely as to the property so doubly insured.

This Court, under a similar condition, struggled to confine the avoidance to the property on which the double insurance existed, and to hold the contract divisible so as to enable the plaintiffs to recover for the chattels, but their decision was reversed by the Supreme Court.

In the present case, the condition is that if the property assured be assigned without a written assent endorsed thereon, the policy shall thereby become void.

Bound by the decision of the Supreme Court in *Gore*

District Mutual Fire Ins. Co. v. Samo, 2 S. C. R. 411, Judgment.

I do not see how we can hold that the policy is only partially avoided, and the same decision seems to hold as had been held in other cases, that the case is within the condition, although only part of the property is aliened.

BURTON,
J.A.

As we have now to give the judgment which the learned Judge, according to our view of the law, ought to have given, we must direct judgment for the defendants, but as they chose to set up an answer which, if true, imputed most fraudulent conduct to the plaintiff, of which no evidence was offered, I agree with my learned brothers that it should be without costs up to and including the trial.

This appeal must be allowed, I think, with the usual result as to costs.

OSLER, J. A. :—

Assuming that there was a sufficient assent to the conveyance by the father—the insured—to the son, and that the latter became the insured in the policy, as the learned Chief Justice held, then the question is what is the effect of the deed from the son to the father of the 18th May, 1893, after which there was no retransfer of the policy nor any consent by the company to the transfer.

If that was not an effective conveyance, we might have to consider the effect of what the company's agent did in transferring the policy after the deed from the father of the 9th February, 1893.

The Chief Justice held that the deed from the son to the father was a valid conveyance, and clearly there was a sufficient delivery. The son executed it, and the affidavits of execution were sworn, etc., and he took the deed back with him and offered it to his father: *McDonald v. McDonald*, 44 U. C. R. 291. Was there a disclaimer? Armour, C. J., would doubtless have found that there was, if the evidence would have admitted of it. But he did not, and looking at all that took place and the fact that the father afterwards took the deed and registered it, it is impossible

Judgment.
OSLER,
J.A.

to find that there was a disclaimer. Doubtless an effectual disclaimer may be made by word of mouth, as the authorities cited in *Moffatt v. Scratch*, 12 A. R. 157, shew, but we cannot find one here.

Then what is the effect of the transfer from the son to the father not assented to by the company? It has been held that it avoids the insurance as to the buildings only.

But this ignores the decision of the Supreme Court in *Gore District Mutual Fire Insurance Co. v. Samo*, 2 S. C. R. 411, where it was held that such a policy as this was one entire and indivisible contract founded on one entire consideration, relating to matters that are connected with and dependent on each other: *Harris v. Waterloo Mutual Insurance Co.*, 10 O. R. 718. The distinction must be kept in mind between the fourth statutory condition and the first, which relates to misrepresentation or omission to communicate circumstances material to the risk and the breach of which only avoids the insurance as to the property respecting which the misrepresentation is made, while the breach of the fourth and other conditions, by force of the condition avoids *the policy*.

See also Beach on Insurance, sec. 383.

MACLENNAN, J. A. :—

I agree with the learned Judge that there was a valid contract of insurance with the plaintiff. I think the effect of the evidence is that the company, instead of assenting to an assignment of the old policy to the plaintiff, and instead of issuing a new policy in place of the old, which had ceased to be of any effect by reason of the assignment of the property to the plaintiff, through its officer struck out the name of John Dunlop from the old policy and inserted therein the name of the plaintiff, and delivered it to him as a valid policy under their corporate seal, in short, as their act and deed. I think it was intended by the company that that old policy so altered should be a valid and effectual policy of insurance to the plaintiff just as if it

had always been in his name, or as if it had now been filled up in his name and issued for the first time.

Judgment.
MACLENNAN,
 J.A.

There can be no doubt the company could, instead of filling up and sealing a new or unused form and executing it, use and issue an old policy for that purpose, adapting it by proper alterations to the new case. I think that is what they intended to do in this case, and that is what, under the circumstances, they must be taken to have done, having delivered the policy to him as an instrument of insurance duly sealed and attested, and the alteration of the name John Dunlop to Benjamin Dunlop duly attested in the margin by the initials of their secretary, Thomas Cameron. Sued upon by the plaintiff as their deed, and as upon a covenant to pay the plaintiff, I think they did not establish, by the evidence in this case, a plea of *non est factum*. This view of the case makes it unnecessary to consider the objection arising from regarding the plaintiff's claim as resting upon an assigned policy.

The next question is whether there was a violation of the fourth statutory condition against assignment without permission. There was a conveyance of the land upon which the insured buildings stood, duly proved by an attesting witness and afterwards registered. The plaintiff undertook the difficult task of shewing that the conveyance had never operated to pass the estate, and he gives an account of what passed between his father and himself when he brought the deed home after having executed it in the presence of the conveyancer. That evidence failed to satisfy the learned Chief Justice that the benefit of the deed had been then disclaimed and refused by the father, so as to render it inoperative. I am compelled to say that I am unable to come to the conclusion that in that respect his decision was wrong.

It remains then to consider whether this policy is divisible, so that the claims for the loss of the personal estate can remain good, although the claim for the buildings is void by reason of the assignment. The condition is that if the property insured be assigned without consent, the

Judgment. policy shall become void. The policy means the contract of insurance, and the contract is single as it was held in *Gore District Mutual Fire Insurance Co. v. Samo*, 2 S. C. R. 411. I do not see how, consistently with that decision, we can hold that this policy is only avoided in part by breach of this condition. I think it has been avoided altogether or not at all, and the only question which could be raised is whether an assignment of only part of the insured property is within the condition. What is said is that "if the property," and it is argued that that means the whole property, and not merely a part of it, "insured," etc. As to this, I agree with the decision of Sir John Robinson, C. J., in *Ramsay Cloth Co. v. Mutual Fire Insurance Co.*, 11 U. C. R. 516, cited by Cameron, C. J., with approval, in *Harris v. Waterloo Mutual Fire Insurance Co.*, 10 O. R. 718, at p. 724. The same argument was open and was made, p. 417, in the Supreme Court in *Samo's* case, but without success; and it was held that although the encumbrance, which was not disclosed, was not upon the whole property insured, but only upon part, and although the encumbrances mentioned in the condition were "encumbrances on the assured property," such non-disclosure was within the condition, and avoided the policy.

I am, therefore, of opinion that the appeal must be allowed, and that the action ought to have been dismissed, but without costs of the action.

HAGARTY, C. J. O. :—

I agree.

Appeal allowed with costs.

KEACHIE V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal Corporations—Damages—Ways.

A municipal corporation is not responsible in damages to a person who is injured in endeavouring to cross in daylight a plainly visible shallow trench, lawfully and necessarily in the street at the time, the person injured being, moreover, familiar with the locality and knowing that there is close at hand a safe passage way across the trench.

Judgment of the Queen's Bench Division reversed.

THESE were appeals by the defendants and third party Statement. from the judgment of the Queen's Bench Division.

The action was brought by the female plaintiff and her husband to recover damages for injuries sustained by the female plaintiff by a fall in crossing Church street, in the city of Toronto, while the street was opened up for the purpose of laying the tracks of a street railway.

The defendants brought in the contractor for the work as a third party, claiming relief over against him if held liable to the plaintiffs.

The action was tried at the Toronto Spring Assizes of 1894, before FALCONBRIDGE, J., and a jury. The accident happened about three o'clock in the afternoon, at the point where Gloucester street crosses Church street. In the latter street there was a trench or excavation about eighteen inches deep and several feet wide in which the ties for the railway were being placed. The work had been going on for some weeks and the plaintiff, who lived in the vicinity, had frequently crossed in safety. On the occasion in question, she was walking with her mother along the north side of Gloucester street, and on reaching Church street her mother crossed the trench safely, but the plaintiff, after stepping into the trench, slipped upon one of the ties and was injured. There was no bridge or passage way across the trench in the line of the sidewalk, but there was a safe passage way a few feet to the left in the line of the roadway. The ties were solidly laid and the work was being done with reasonable expedition.

Statement. The following were the questions submitted to the jury and their answers thereto:—

“ Was the accident to the female plaintiff caused by the negligence of the defendant corporation ? Yes.

If so, wherein did such negligence consist ? In not providing a gravel or plank walk from side to side of the excavation, including both railway tracks and the devil strip, it being compulsory to build a safe crossing for general traffic in the centre of the roadway, it must necessarily be logically compulsory to supply the same means for the safety of pedestrians, and further, the city being in possession of the facts that ordinary danger did exist for about nine days at this crossing.

Was the accident to the female plaintiff caused by the negligence and want of ordinary and reasonable care on her part ? No ;—So that by the exercise of ordinary and reasonable care on her part the accident might have been avoided ? She exercised all reasonable care.

If so, wherein did such want of ordinary and reasonable care on her part consist ? No. 3 answers No. 4.

Did the plaintiff, Ida Keachie, know the crossing was dangerous before she attempted to cross there on the 8th November ? Yes, ordinarily dangerous.

If so, did she voluntarily incur the risk of crossing ? Yes, ordinary risk.

In the event of the plaintiffs being held entitled to recover, at what sum do you assess the damages ? First, to the plaintiff, Morton Keachie ? Second, to the plaintiff, Ida G. Keachie ? \$300 to Mr. Keachie, and \$700 to Mrs. Keachie.”

Upon these findings, judgment was entered in favour of the plaintiffs against the defendants, and also in favour of the third party. Upon appeal, the Queen's Bench Division refused to interfere with the judgment in favour of the plaintiffs, but gave relief over against the third party.

The defendants and the third party appealed, and the appeals were argued before HAGARTY, C. J. O., BURTON,

OSLER, and MACLENNAN, JJ.A., on the 15th and 16th of Argument.
May, 1895.

J. B. Clarke, Q. C., for the city of Toronto.

W. Nesbitt, and J. Tytler, for the third party.

W. R. Riddell, for the plaintiff.

June 25th, 1895. HAGARTY, C. J. O. :—

The work done by the defendants in the public streets was necessary and proper. They provided a safe crossing over Church street for teams and passengers.

This accident occurred in full daylight. The plaintiff lived in the neighbourhood and passed this point nearly every day for two or three weeks. She knew perfectly well of the centre crossing, but to avoid, as she said, mud in the street, frequently stepped over this open part or trench without injury.

If this had occurred at night and to one not familiar with the state of the road, a very different case would have been presented.

An open trench from sixteen to eighteen inches deep (the first measurement seems the truest statement) is nothing very formidable to a passenger fully aware that there was an open level crossing a few feet to her left. She had walked through it frequently and chose to do so again on this occasion and her foot slipped in some not clearly shewn manner, on or over the tie firmly fixed in the sand.

It seems to me beyond all reason to fix liability on a public body under such circumstances. The plaintiff is approaching Church street. She sees a safe level pass provided in the centre of the street, a few feet to her left. She also sees the shallow, open trench, into which she lightly and easily steps, as she had frequently done before.

There her foot slips—not in any way because she fell into any open space or excavation, but in the act of stepping on or over the tie, just as if that tie had been lying

Judgment. transversely across the sidewalk in executing some necessary repairs.

HAGARTY,
C.J.O.

I think where a person with two passages in front, one perfectly safe, the other encumbered with materials for repair, deliberately elects to use the latter, as she had constantly done before, that she voluntarily takes all risk on herself, and ought not to complain because by an unlooked for accident her foot might slip, as she here has told us.

A hundred people, perhaps, passed daily, as she did, over this trench without any idea of danger, and no reasonable person could, as I think, see any negligence to cause injury to any one passing there in broad daylight.

I think no case is made out against the corporation or the contractor.

MACLENNAN, J. A. :—

I am of opinion that these appeals should be allowed.

The action is for damages sustained by the female plaintiff by a fall in crossing Church street at Gloucester street while Church street was opened up for the purpose of laying the tracks for the electric railway. The accident occurred about three o'clock in the afternoon. Mrs. Keachie and her mother were proceeding west on Gloucester street, and in crossing the excavation the mother proceeded safely, but the plaintiff fell upon one of the ties and was severely hurt. It was not disputed that the work was a lawful work which was being done by the defendants and their contractor, nor but that it was being done in a proper, lawful manner. No witness for the plaintiffs suggested that it was not being proceeded with with proper dispatch, and the defendants' witnesses shewed that it was. There was no evidence that the condition of the works where the accident occurred was other than it was necessary that it should be at that particular time, in the course of the orderly, regular and reasonable manner of performing it. The excavation had been made, the ties had been laid and

the rails placed upon them. This was work which was equally as necessary to be done in the line of the sidewalks as in the middle of the road. The plaintiff attempted to cross in the line of the sidewalk, the condition of which was evident, and I think it was necessary for her to shew that the condition of things at that place was illegal in order to make the defendants liable. I think there was no evidence that such was the case. The liability of the defendants depends solely on section 531 of the Municipal Act. That section says that the municipality shall keep every street in repair, and in default of so doing shall be civilly responsible for all damages sustained by any person by reason of such default.

Judgment.
MACLENNAN,
J. A.

The question therefore is, was that part of the street where the plaintiff fell then out of repair? The particular place being at an intersection of two streets, was part both of Church street and Gloucester street. It is not disputed that it was in the same condition exactly at that point as it was for some distance up Church street, part of a considerable section over which the work had reached a certain stage of progress towards completion. Now, although this work was going on, the street did not cease to be a highway. The public could pass over every part of it still, and no one could lawfully prevent them. The plaintiff, seeing the condition of things, had a right to pass where she did, just as she could if she chose have gone further up and crossed over, or just as any person living further up the street could cross over directly instead of going down to the middle of Gloucester street and crossing on the bridge of ties.

I am utterly unable to understand how it can be said that this street was out of repair at the point in question without at the same time saying that it was out of repair throughout its whole length where the work of constructing the electric railway was going on. The defendants had a lawful right to make the excavation, to lay the ties and to place the rails exactly as they were, at that place the same as at other places on the street. They were no

Judgment. more required to put a bridge at that place than at other places, for though it was a part of Gloucester street it was also a part of Church street. A safe crossing had in fact been provided near by, which the plaintiff had used before and which she might have used on this occasion. She was not obliged to use it, however, and did not choose to use it. She had a right to go where she did, but the works which were being constructed being lawful, the condition of the street was lawful, and she necessarily crossed where she did at her own risk.

MACLENNAN,
J.A.

I think there was no evidence of negligence to go to the jury, and that the action ought to have been dismissed.

The appeals should therefore be allowed, with costs here and in the Courts below.

BURTON, and OSLER, JJ. A., concurred.

Appeals allowed with costs.

CANADA LANDED AND NATIONAL INVESTMENT CO. V.
SHAVER.*Mortgage—Covenant—Purchaser of Equity of Redemption.*

The purchaser of land, subject to a mortgage, does not *ipso facto* become personally liable to the mortgagee for the amount of the mortgage, nor does he become liable to the mortgagee by entering into a covenant with his vendor to pay the mortgage. In other words, the burden of a covenant to pay mortgage moneys does not run with the mortgaged lands. Judgment of the Queen's Bench Division affirmed.

THIS was an appeal by the plaintiffs from the judgment Statement.
of the Queen's Bench Division.

The plaintiffs were a loan company carrying on business at Toronto. By a charge or mortgage made under the Land Titles Act, on the 18th of December, 1889, Mary Earl mortgaged certain lands to J. S. Leslie for securing payment of \$4,400 on the 18th of December, 1894, and interest half-yearly as therein specified. The mortgage contained a covenant by Mary Earl, for herself, her heirs, executors, administrators and assigns, to pay that sum and interest on the days and times mentioned in the mortgage. On the 29th of July, 1890, Mary Earl conveyed the lands to Mary Ann McFarlane, subject to the mortgage, the consideration being the assumption and payment by Mary Ann McFarlane of the sum of \$4,400 and interest secured by the Earl mortgage. On the 29th of October, 1890, Mary Ann McFarlane conveyed the lands to the defendant Shaver, the consideration in part being the payment by Shaver of the mortgage moneys of \$4,400 and interest, and in the conveyance there was a covenant by Shaver to pay this sum and to save her harmless and to indemnify her against payment thereof. Subsequently Leslie wished to obtain payment of the mortgage and negotiations took place between him and Shaver, and between Shaver and the plaintiffs, in consequence of which the plaintiffs agreed to take an assignment of the mortgage from Leslie. The mortgage was assigned to them on the 11th of August,

Statement. 1891, and Leslie was paid off, and both parties paid Shaver a commission for arranging the matter. After this, Shaver paid to the plaintiffs several instalments of interest, but he refused to pay the instalments of interest which fell due on the 18th of June, 1893, and on the 18th of December, 1893. On the 8th of March, 1894, the plaintiffs obtained from Mary Ann McFarlane an assignment of the benefit of the covenant entered into by Shaver, and they then brought this action against Shaver and his wife, claiming as against Shaver payment of the mortgage moneys and interest, and as against both defendants a sale of the lands. Shaver contended that he was not personally liable to pay the mortgage moneys and interest and he pleaded a release of his covenant made in his favour by Mary Ann McFarlane on the 9th of March, 1893. As far as the land was concerned the defendants admitted the plaintiffs' claim.

The plaintiffs then amended their claim and contended that Shaver could not as against them set up the release and that he was estopped from denying his liability to them, he having, as alleged by them, represented to them at the time of the assignment of the Leslie mortgage that he would pay it.

The action was tried at Toronto on the 4th of October, 1894, before ROSE, J., who found as facts "that Shaver made such statements as to the ownership of the property and his liability and his intention of discharging that liability as to put the transaction in the most favourable light before the company and that the company was induced by those representations to take an assignment of the mortgage," and he held that he was bound to make good the statements he had then made, and gave judgment in favour of the plaintiffs. He also allowed the plaintiffs to amend by joining Mary Ann McFarlane as co-plaintiff, and asking that the release be set aside.

This amendment was also allowed by the Queen's Bench Division, but the judgment on the merits was reversed and

the plaintiffs appealed, the appeal being argued before Argument.
HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.,
on the 27th and 28th of May, 1895.

McCarthy, Q. C., and A. Hoskin, Q. C., for the appellants.
Upon the facts found by the learned Judge at the trial, it is clear that the respondent is liable to the plaintiffs for the amount of the mortgage moneys, these moneys having been paid by them to Leslie at his request and to his use. He was at that time liable to pay the mortgage moneys by virtue of the covenant entered into by him with Mary Ann McFarlane and the advance made by the appellants was in substance a payment for Shaver, the debtor, to the mortgagee, his creditor, upon which an implied promise of repayment arose: *Spencer v. Parry*, 3 A. & E. 331; *Lubbock v. Tribe*, 3 M. & W. 607. The subsequent dealings between the parties and the making of payments by the defendant are strong evidence in support of the plaintiffs' position. Apart from this question of implied promise, however, the respondent is liable on the ground of the representations made by him as to his intention to pay the mortgage. The case is very like *Piggott v. Stratton*, 1 DeG. F. & J. 33. In that case as well as in this case the representations made were true at the time they were made and were made of existing facts. It is not, therefore, so much a question of estoppel as a question of preventing the defendant from doing something that would be a breach of the representations made by him upon which the plaintiffs relied and acted. Then, apart altogether from the contractual facts of this case, Shaver is liable to the plaintiffs simply by reason of his purchase of the land. The mortgagee has no privity. There are several authorities to the contrary, but the authority binding this Court and it is established that the personal obligation extends to a person who takes in *Trust* *Cozier, Parker v. Green* 24 Gr. 557. It is true that a person has a right to refuse and is not bound to make a sale, but any sale could be effected and a mortgagee is a person who has the Statute of Limitations from the day of the mortgage.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

It would, I think, be a strained—I might almost say an extravagant—construction of the evidence to hold that there was anything in the nature of a loan or advance to the defendant or that the money was lent at the request of the defendant in order to pay his creditor or in any other sense than that he was the agent of the mortgagee in selling the mortgage to the plaintiffs. I think the transaction was begun and carried out simply as the ordinary one of an assignment or sale of a mortgage, and that the plaintiffs had no idea that they were acquiring any right against the defendant other than such as might attach to him as the owner of the equity of redemption who had covenanted with his vendor to pay off or assume the mortgage. Then, in what position did the defendant stand towards the mortgagor or her assignees in that respect? The defendant's manager had his own view of it, which on this appeal has been pressed upon us as the right one, and it was that, in my opinion, which he relied on, namely, that a purchaser of the equity of redemption who had made himself liable to his vendor to assume or to indemnify him against the mortgage debt would thereby become personally liable to the mortgagee, who could enforce against him directly the covenant or obligation he had entered into with the mortgagor.

But this, in my opinion, is not the law, and with, I think, the sole exception of the case of *In re Cozier, Parker v. Glover*, 24 Gr. 537, is opposed to the whole course of decision in the Courts of this Province. Many of the authorities are cited in *Aldous v. Hicks*, 21 O. R. 95, and *Frontenac Loan Co. v. Hysop*, 21 O. R. 577; and for the law of England on the subject may be cited *Barry v. Harding*, 1 Jo. & Lat. 475, at p. 485; *Barham v. Earl of Thanet*, 3 M. & K. 607; and the recent case of *In re Errington*, [1894] 1 Q. B. 11, where *Woods v. Huntingford*, 3 Ves. 128, is referred to, in which case it is said by the Master of Rolls: "Where a man buys subject to a

Judgment.

OSLER,
J.A.

mortgage and has no connection or contract or communication with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself as between his heir and executor, but merely that, which he must do, if he pays a less price in consequence of the mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally."

As between the mortgagee and a subsequent purchaser of the equity there is no privity in respect of the covenant or obligation of the latter towards the mortgagor to indemnify him against the mortgage, and the "connection, or contract, or communication," spoken of in the cases must be something by which the purchaser of the equity dealing directly with the mortgagee takes the debt upon himself and makes it his own: *Earl of Oxford v. Rodney*, 14 Ves. 417; *In re Errington*, [1894] 1 Q. B. 11. Payment of interest or instalments of principal in accordance with the terms of the mortgage, as shewn in the last case, will not suffice, for these "are perfectly natural acts and done in order to save the property from foreclosure."

When, therefore, the plaintiffs purchased the mortgage from Leslie, the defendant did not *ipso facto* come under any liability to them, and the payments afterwards made by him *quod* mortgagor made no difference in that respect.

This consideration goes far to displace the next ground on which the plaintiffs rely, viz., that the defendant is equitably estopped from setting up the release of his covenant. If by the assignment of the mortgage the plaintiffs acquired no legal right against him and no assignment of his covenant was in question or contemplated at the time, I fail to see how the defendants were affected by the representations they rely on. As regards any existing facts, they were all true, and were such as appeared in the registry office or in the documents themselves; while, as regards the expression of the defendant's intention to pay, it may have been, and probably was, true enough at the time, but as a mere expression of intention would consti-

Judgment.

OSLER,
J.A.

tute no ground of estoppel, and it is certainly very far from amounting to a contract.

But in whatever way it is to be looked at, it appears to me that what the defendant said had relation to the existing state of things, or as they would exist when the plaintiffs acquired the mortgage. If they thereby, as represented by him, acquired no right against him, how can he be estopped from interposing any obstacle he pleases in the way of their acquiring one of a different character from that which they supposed they had as mere mortgagees or assignees of the mortgage?

The fact that when taking the mortgage the plaintiffs took neither an assignment of the defendant's covenant with his vendor nor a covenant or agreement directly with themselves, is strong to shew that they relied simply upon the right they assumed would attach to their status as mortgagees, and that there was no idea on their part that the defendant was himself a borrower: *Piggott v. Stratton* 1 DeG. F. & J. 33; *Spicer v. Martin*, 14 App. Cas. 12, at p. 23.

Then, as to the claim to set aside the release. This can be obtained only through the intervention of McFarlane, who certainly cannot be said to have expressed the intention of avoiding it by her subsequent assignment of the covenant to the plaintiffs, considering the circumstances under which it was given. The Divisional Court seem to have assumed that she had actually been made a party to the action at the trial, but their order is drawn up directing that she be made a party, as if done then for the first time. She is evidently not herself complaining that any fraud or imposition was practised upon her or that she was misled or acted without proper advice, and is probably not under any very serious apprehension of inconvenience resulting from any proceedings against her on the part of Mrs. Earl.

I do not think we should interfere with the judgment of the Court below on this part of the case. Substantially I agree with the view taken by them throughout, and would therefore dismiss the appeal.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,
J. A.

The judgments of the learned Judges of the Divisional Court so fully express the opinion which I have formed after full consideration of the main point in the case, that I am content simply to express my concurrence therein.

It was, however, contended by the appellants that they were entitled to have Mrs. McFarlane added as a co-plaintiff, and to have relief, first setting aside the release given by her, and then enforcing the defendant's covenant of which the plaintiffs are her assignees.

I think, however, that indulgence ought not to be granted. The defendant's covenant to Mrs. McFarlane is gone utterly at law. It is and ought to be a matter purely for Mrs. McFarlane's own voluntary discretion to attack the release on equitable grounds, and to endeavour to set it aside. If she do that and succeed, the plaintiffs may then be able to get an assignment of the covenant, and may, if they are so advised, sue upon it. But if the Court were to make an order adding Mrs. McFarlane as a party, it would in effect be compelling her to litigate the validity of her release whether she would or not. The Court has no power to do that unless the plaintiff company has the right to require the Court so to do, which I do not think they have. As I understand it, the assignment by Mrs. McFarlane to the company was not for value but was gratuitous, and gives the company no right to require or compel her to assist them in any way as against the defendant, even if an assignment for value would have done so.

I think the appeal should be dismissed.

BURTON, J. A. :—

I agree.

Appeal dismissed with costs.

IN RE CORNELIUS F. MURPHY.

Extradition—False Document—Forgery—Evidence.

The prisoner's brother opened a bank account in an assumed name and drew cheques from time to time thereon. Several of these cheques were paid, but the last one the prisoner cashed at his own bank, knowing that there were no funds to meet it:—

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A. That there was evidence from which it might reasonably be inferred that the opening of the account in the assumed name was part of a conspiracy between the prisoner and his brother to defraud and that there was, therefore, the fraudulent uttering of a false document which would constitute forgery.

Per BURTON, and OSLER, JJ.A. That as the account was a genuine one, and there was no false representation as to the drawer of the cheque, the offence of forgery was not made out.

Held, also, per HAGARTY, C.J.O., and MACLENNAN, J.A. That it is not necessary to shew in extradition proceedings that the prisoner is liable to conviction of the crime charged according to the law of the demanding country.

Per BURTON, and OSLER, JJ.A. That it must be shewn that the prisoner is liable to conviction for the crime charged, according to the law of both countries.

In the result the judgment of the Common Pleas Division 26 O. R. 163, was affirmed.

Statement.

THIS was an appeal by the prisoner from the judgment of the Common Pleas Division, reported 26 O. R. 163, and was argued on the 16th and 17th of May, 1895, before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.

F. Fitzgerald, for the appellant.

A. Bruce, Q. C., for the respondents.

The line of argument is fully stated in the report below, and the following cases, in addition to those there cited, were referred to: *Commonwealth v. Baldwin*, 11 Gray 197; *People v. Wiman*, 50 Alb. L. J. 40; *Regina v. Whyte*, 5 Cox C. C. 220.

June 25th, 1895. HAGARTY, C. J. O.:—

Apart from all decisions or text-writers' remarks on the question, I should have no hesitation in holding that the cheque purporting to be signed by R. Osborne, which the

utterer offered to the National Bank, knowing it to be signed by his brother, F. Murphy, and that no such person as Osborne existed, and knowing that the assumption by F. Murphy of that name was in direct prosecution of an attempt to defraud, came within the words and meaning of our criminal legislation.

Judgment.

HAGARTY,
C.J.O.

Section 421 of the Code defines a "false document" to be a document purporting to be made by a person who did not make the same, or, a document purporting to be made by some person who did not in fact exist.

I fully agree that a person who has assumed a name different from his true name may for all purposes be bound by contracts or writings made in such assumed name.

But where there is the assumption of such name for the express purpose of obtaining credit, by representing such name to be that of an actual person, referred to and falsely stated to be in existence, a cheque or note signed in such name for such purpose, may, I think, be properly designated as a false document.

I think the evidence in this case is open to the drawing of the conclusions stated by the learned Chief Justice. I need not repeat his statement of such conclusions.

It is urged that there was a real existing account in the Bank of Commerce as the account of Robert Osborne, and that cheques thereon in that name had been duly honoured, and, if the account had not been then overdrawn, the cheque in question would have been duly honoured.

But my difficulty is that the opening of such account in that name was the beginning of a fraudulent scheme and arrangement between the two Murphys, to be acted on in the raising of money by false pretences, and by holding out a non-existent person as a real one with a real bank account, and for the express purpose of making notes and cheques in the false name, including the cheque in question.

When the prisoner issued it to the National Bank he knew it was a false document, false in the sense that it purported to be made by a non-existing person, knowing that

Judgment. the name Robert Osborne was written by his brother,
HAGARTY, F. Murphy.
C.J.O.

The late Mr. Justice Stephen (Criminal Law, 5th ed., p. 327) a very high authority, takes this view, at the same time stating that there is no direct authority on the point: "A., personating B., draws a cheque in his assumed name of B., on a bank with which in his assumed name he had opened a genuine account by the actual payment of money to his credit. A. does not make a false document." He refers to *Regina v. Martin*, 5 Q. B. D. 34, as favouring though not deciding his view. He also cites *Regina v. Dunn*, 1 Leach C. C. 59.

As Sir James Stephen puts the case, his view may be quite right. But if we add to his statement, that the account in the assumed name was opened for the express purpose of enabling the prisoner to commence this fraudulent dealing with fictitious paper, and to raise money on such paper by causing the belief of the existence of the fictitious maker or endorser, I find great difficulty in applying this doctrine as governing this case.

Regina v. Martin, 5 Q. B. D. 34, is, as the learned Chief Justice puts it, very clearly distinguishable. Sir A. Cockburn, who tried the case, held that the fact was that Robert Martin, who was well known to the prosecutor, and signed the cheque William Martin, did not get credit by substituting William for Robert as he would equally have got credit had he signed his true Christian name.

On the case reserved, the same learned Judge cited *Regina v. Dunn*, 1 Leach C. C. 59, where the Judges held "in all forgeries the instrument supposed to be forged must be a false instrument in itself; and if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being given wholly to himself, without any regard to the name, or any relation to a third person."

I think the distinction is clear. The prisoner here gave the cheque as that of Osborne, knowing that there was no such person. I consider it given in furtherance of the

original fraudulent conspiracy or design to establish this fictitious credit in the Bank of Commerce, and to defraud others by representing it as a real account with a real person.

Judgment.
HAGARTY,
C.J.O.

In Roscoe's Digest of the Law of Criminal Evidence, 11th ed., p. 532, it is said: "If the name be an assumed one, then it will be forgery to draw up a document in that name, if the name were assumed for the express purpose of giving an appearance of genuineness to the document and carrying the fraud into effect."

The case of *Rex v. Peacock*, R. & R. 278, (cited by the Chief Justice) is set out in Roscoe. The defendant was indicted for forging a bill of exchange in the name of Thomas White as drawee. He had gone to Newnham where he officiated as curate for two months under the name of White, and obtained cash on a draft drawn in that name. During all the two months he was known as Thomas White. The jury were told that if he had assumed the name for the sole purpose of obtaining the curacy, and it was no part of his original plan to raise money by drawing in a false name, to acquit him; but if they were satisfied that he went to Newnham intending fraudulently to raise money by a bill or bills drawn by him in a false name, and that the bill was drawn in prosecution of such intent, to convict.

A case was reserved, and it was held by eleven Judges that where proof is given of the real name, and no proof of any change of name until the time the fraud was committed, it throws the onus on the prisoner to shew that he had before assumed the false name on other occasions, and for other purposes, and also that where a person is proved to have assumed a false name for the purpose of pecuniary fraud connected with the forgery, etc., in such false name it is forgery.

Rex v. Whiley, R. & R. 90, is on the same lines, and the jury were asked if the false name had been assumed with intent to defraud on this draft.

In *Rex v. Walker*, cited in Roscoe, at p. 534, it was held

Judgment. that the assumption of the name for the express purpose of carrying out the forgery, was a necessary ingredient in that class of case.
HAGARTY,
C.J.O.

In *Rex v. Bontien* (also in Roscoe, at p. 534) the prisoner was acquitted on proof that a year or so before the alleged forgery in the name of Scott, the prisoner had been known in business by that name in other transactions, the Judges on a case reserved holding that there was not sufficient evidence that he had assumed the name for the purpose of the fraud.

In Roscoe it is stated that "the result of the cases is, that where the fictitious name is assumed for the purposes of the fraud, the offence of forgery may be proved, but not where the credit is given solely to the person without any regard to the name, as in *Regina v. Martin*."

In Russell on Crimes, 5th ed., p. 648, the cases are discussed, and, as far as I can see, the same view is taken as in Roscoe.

In *Regina v. Whyte*, 5 Cox C. C. 290, the same view is adopted, that the name must be assumed with a view of defrauding by issuing false bills of exchange. See also *Regina v. Wardell*, 3 F. & F. 82.

I am of the opinion that the evidence shews a case in which there would be clear ground for committing the accused for trial in Canada, if the offence were here committed, and the questions of law arising on the evidence would be determined on the facts found by the jury.

I am not willing, except on the express decision of some Court which I am bound to obey, to hold that it is necessary to give proof that by the law of the place where the alleged offence was committed the accused would be liable to the charge of forgery.

I do not consider that there is any evidence before us that there is no such crime as forgery in the State of Illinois. There is a professional gentleman's opinion that on the facts in evidence the accused was not guilty of forgery.

The accused was charged with uttering and passing as

genuine a certain false and forged bank cheque, with intent to defraud, and a warrant issued on that charge, and formal application for his extradition is made.

Judgment.
HAGARTY,
C.J.O.

I see nothing whatever before us to warrant any belief that forgery is not a crime under the foreign law. I read the evidence of the professional witness merely as his opinion on the effect of the evidence.

According as the facts are found on the trial, the law applicable thereto will be laid down by the Court. It is then that the result of the facts given in evidence will decide the guilt or innocence of the accused, and the opinion given by the professional witness is simply his opinion.

The high contracting parties treat such crimes as murder, forgery, rape, larceny, etc., as crimes well known to both, and especially as between nations using the same language, and laws based on generally similar principles. I cannot think it reasonable to insist on proof that the named crime exists in the demanding nation.

We see evidence that the charge of forgery is made against the prisoner, and it seems to me, with much respect towards those who differ from me, that we are throwing an unlooked for difficulty in the way of a fair construction and execution of the treaty and of our own statute law based thereon.

BURTON, J. A. :—

If sections 421, 422 and 424 of the Criminal Code of 1892, had created the crime charged in this case as a new offence I should have had no hesitation in holding that no case had been made out for extraditing the prisoner, but the definition of a false document given in the Code makes no change in the law but merely defines in statutory form what had by judicial construction in the Courts of our own country been held to constitute a false document, the making of which with the knowledge and intent mentioned in the statute is declared to be forgery, and the uttering

Judgment.

**BURTON,
J.A.**

of which with like knowledge by one who uses, deals with, or acts upon it as if it were genuine, is made an indictable offence punishable in like manner as forgery.

The object of the treaty, as it seems to me, was to establish a reciprocal right on certain terms to demand the surrender of certain fugitives from justice and to impose a corresponding obligation to deliver such fugitives who, having committed certain specified offences within the jurisdiction of our country, have fled from justice and taken refuge within that of another: see Spear on Extradition, p. 39. What object then is attained by shewing that the offence charged would be an extraditable crime according to our law unless it is also shewn that it would be such a crime according to the law of the country in which the alleged offence was committed?

Although it may be perfectly clear that the offence charged is forgery according to our law, that in itself would not, in my opinion, justify an order for extradition unless it be made to appear to the tribunal dealing with the matter that it is also an offence according to the law of the country where it is alleged to have been committed.

I agree that the evidence is sufficient to warrant a committal, if upon the whole case according to the law of this country it would justify the committal of the party for trial if the offence had been committed here. But what is the fact to be established? It is that an extraditable crime has been committed in the State of Illinois. The same description of evidence as would be sufficient to put the party upon his trial here would suffice, but it is to my mind clearly no evidence that an extraditable crime has been committed in Illinois, because if the crime had been committed here it would have amounted to forgery or the uttering of a forged instrument.

It is quite true that under the terms of the treaty, although the offence charged might be indictable as forgery or the uttering of forged paper in Illinois, that would in itself furnish no ground for extradition unless it also con-

stituted a crime by our law ; but the foundation of the whole charge is that it amounts to the crime of uttering forged paper in Illinois.

Judgment.
BURTON,
 J.A.

In a recent case in England, *In re Belencontre*, [1891] 2 Q. B. 122, Cave, and Wills, JJ., held that in order to justify extradition it was necessary to establish that the accused person was accused of a crime in the country where the alleged offence was committed, which was a crime by English law, and that there should be a *prima facie* case made out that he was guilty of a crime under the foreign law, and also of a crime under English law. If those conditions are satisfied, and not otherwise, the extradition ought to be granted.

This has always been my view of the law.

The late Chief Justice Dorion, for whose opinions I always entertain a very great respect, expressed a contrary view in *Re Worms*, 22 L. C. Jurist 109. He was dealing in that case with an ordinary case of forging another person's name—pure and simple—a case which would be forgery by the laws of all civilized countries, and does not appear to have had present to his mind, I say so with all deference, the complicated cases in which either by statute or judicial interpretation offences have been declared to be forgery in a particular locality.

Take this case for instance :—If the State of Illinois had declared that such a state of facts as existed in *Rex v. Peacock*, R. & R. 278, constituted the crime of forgery, and the Courts in England and in this country had held that they constituted only the offence of obtaining money by false pretences, is it not clear that although the accused might be tried in Illinois for forgery he could not be surrendered, it not being forgery by the law of this country ? I might multiply instances. If, on the contrary, although the facts in *Rex v. Peacock*, R. & R. 278, would compel us in a precisely similar case, to hold the party guilty of forgery if tried here, it would not necessarily be held to be forgery in Illinois, the result necessarily being that the prosecution there must fail. We are, perhaps, in these cases inclined to

Judgment.

BURTON,
J.A.

allow ourselves to be influenced by the facts in the particular case, but it must not be overlooked that we are laying down a rule for all cases, and it seems somewhat inconsistent with one's ideas of justice that a person should be carried to a foreign country, it may be thousands of miles away, and put to the annoyance and expense of a trial, and, it may be, left penniless there, away from his home, when a disclosure of the facts would have shewn it was not a case for extradition.

But this case differs, in my opinion, from *Rex v. Peacock*, R. & R. 278. That case is, perhaps, explainable on the ground that White was representing himself as the person proposed as curate, and who had a living in Dublin, and it was to that individual, therefore, to whom the credit was given, and not to the person who professed to personate him. Here the person signing the cheque did not profess to be any one else but Robert Osborne, and to him in that name, and to no one else was the credit given.

One of the highest authorities upon the criminal law in recent years, the late Sir James Fitz James Stephen, in his admirable Digest of the Criminal Law, says (5th ed., p. 324) that it is forgery to make a document in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing, but he goes on to qualify that definition, and to hold that it is not making a false document "to sign a document in the name of a person personated by the person who signs it, or in a fictitious name, provided that the effect of the instrument does not depend upon the maker's identity with the person personated, or the correctness of the name assumed by him."

And he gives an illustration which corresponds exactly with this case if we leave out of view that the parties may from the first have contemplated the fraud which they ultimately carried out, which to my mind is a very different thing from forgery. His illustration is this:

"A. personating B., draws a cheque in his assumed name of B., on a bank with which in his assumed name he had

opened a genuine account by the actual payment of money to his credit. A. does not make a false document."

Judgment.

BURTON,
J. A.

"Such," he says, "I submit would be the law, though I know of no case in which the precise question has been determined;" but he points out that if the law were otherwise, a person passing by a false name would go half way to forgery every time he signed it. "If a man passing by a false name drew many bills and regularly provided for them, and at last drew one for which he could not and ought to have known that he could not provide, I do not think," he says, "he would be guilty of forgery any more than if he had used his own name. The use of a false name is no doubt a fact from which an intent to defraud may often be inferred, but which is a different matter," and then he refers to *Regina v. Martin*, 5 Q. B. D. 34, which he thinks confirms his view.

In the case of *Regina v. Dunn*, 1 Leach C. C. 59, in which the prisoner was held guilty of forgery—Aston, J., dissenting—the Judges in giving judgment agreed that in all forgeries the instrument supposed to be forged must be a false instrument in itself, and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being given wholly to himself without any regard to the name, or any relation to a third person. Although nine Judges held in that case that the crime amounted to forgery, in deference to Mr. Justice Aston's opinion the sentence was commuted.

Here the banks all knew that the person opening the account and drawing the cheques professed to be the person named, to him alone was the credit given, he and he alone would have been the party liable upon the cheque in the event of its dishonour, and it is not pretended that any third person of the name of Osborne was intended.

I can understand a person representing himself to be a member of a leading banking firm depositing money with a bank, and drawing cheques from time to time, and eventually drawing one for which there were no funds, although

Judgment.

**BURTON,
J.A.**

the banker knew that that person signed the cheque he would have been influenced in taking it by the belief that the person signing it was the person he represented himself to be, a member of a responsible banking firm, and that he would be guilty of forgery.

Here the person signing the cheque was known to the bank on which it was drawn as Robert Osborne, the credit was given to him as Robert Osborne, not to some other person of that name, and his subscribing it in that name cannot make it forgery. On the ground, therefore, that there was no evidence to shew that such a transaction was forgery by the law of Illinois, and even if so, it is not so here, although a case of gross and deliberate fraud, I am of the opinion that the case is not made out.

Whilst I fully agree with the late Chief Justice of this Court, that it is in the interest of both countries that neither should be made the asylum for forgers, cheats and embezzlers, and that as few impediments as possible should be allowed to exist to their being returned to the country against whose laws they are offenders, I also fully concur in his view that it is incumbent upon us to see that the act charged clearly constitutes an extradition offence, and unless it is established as a matter of law that it is so the accused ought not to be surrendered.

OSLER, J. A. :—

I am of the same opinion. There is no evidence whatever of any fraudulent intent in the use of the particular cheque in question, and that fraudulent intent must be shewn. If the prisoner was guilty of forgery in using this cheque, then he was also guilty of forgery in using the previous cheques, though they were paid in due course.

Then, I think also, that the prosecutors must shew that the prisoner has been guilty of forgery according to the law of Illinois, but they have not done this, and the mere fact that surrender has been demanded is not enough. Clearly the offence in question is not forgery in some of

the States : see *Commonwealth v. Baldwin*, 11 Gray 197, and the onus is on the prosecutors to shew that by the law of Illinois it is.

Judgment.

OSLER,
J.A.

MACLENNAN, J. A. :—

I am of opinion that this appeal should be dismissed.

I think the evidence, which I have read very carefully since the argument, is such that from it a Court and jury might properly come to the conclusion that the false names assumed by Frederick Murphy were so assumed by arrangement between himself and his brother the prisoner, in order by false cheques to defraud some one of the several banks in which they had opened accounts in those false names. If so, I think the authorities shew that the cheque was a forgery.

I agree entirely in the judgment of the Chief Justice just read, and also in that of the learned Chief Justice of the Common Pleas Division.

*The members of the Court being divided in opinion,
the appeal was dismissed with costs.*

IN RE MCILMURRAY AND JENKINS.

Plans and Surveys—Amendment of Plan—Ways—Closing Street.—“Party Concerned”—52 Vict. ch. 20, sec. 7 (O.).

All persons who buy lots according to a registered plan do not *ipso facto* become “parties concerned” within the meaning of section 7 of the Land Titles Act, 52 Vict. ch. 20 (O.), in every street shewn upon it. Whether they are “concerned” or not in having a particular street kept open is a question of fact and in this case in the absence of any representation at the time of the sale, by the vendor, that the street would be kept open, it was held that a person owning a lot several hundred yards away and on the other side of a highway from the street in question, could not object to its being closed.
Judgment of the Common Pleas Division affirmed.

Statement. THIS was an appeal from two orders of ROSE, J., and an order of the Common Pleas Division.

Robert Jenkins and others were the owners of a large tract of land in the township of Etobicoke, fronting on Lake Ontario, and running back some distance north of the Lake Shore road. This land was laid out in building lots on both sides of the road by the owners, and the plan was filed in the office of the Master of Land Titles, at Toronto, as No. M. 77 on the 8th of May, 1889. The plan shewed a street or open space along the front of the property marked on the plan as “The Parade,” about 1,250 feet in length, by about 100 feet in width. A narrow strip was, however, reserved between the Parade and the shore of the lake. The distance from the north side of the Parade to the south side of the Lake Shore road was about 350 feet. After the plan was filed, a number of lots were sold and conveyed to the purchasers. On the 14th of June, 1893, Jenkins and the other owners of all the lots south of the Lake Shore road made an application for the amendment of the plan by closing the Parade, and an order to that effect was made by ROSE, J., the consent of the municipal council of the township of Etobicoke, who had not done anything to accept any dedication of the Parade as a public street or highway, being given. The appellants were owners of lots lying

to the north of the Lake Shore road, and no notice of the application to amend the plan was given to them. They made application to rescind the previous order amending the plan, and on the 12th of February, 1894, this application was heard by ROSE, J., and dismissed. In support of their application, an affidavit was filed in which one of the appellants stated that "one of the inducements held out to me to purchase lands on Plan M. 77 was the use of the parcel of land as a promenade marked as 'The Parade' on said plan, and I say that I would not have paid the price I did for said lot, had I not been induced to do so by the prospect of being able to enjoy the water front on the lake by means of said Parade." It was also sworn that the closing of the Parade would depreciate the value of the lots in question. The dissatisfied lot owners then, on the 22nd of February, 1894, gave notice of appeal from this order to the Court of Appeal, but the appeal was not, at the time, prosecuted, and instead a motion was made before the Common Pleas Division, and was argued on the 30th of April, 1894, before that Court, who, on the 23rd of June, 1894, dismissed the application, holding that no appeal lay to them, and that on the merits the order was right. Statement.

This appeal was then brought from all three orders, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 21st and 22nd of May, 1895.

The preliminary objection was taken that there was no right of appeal from the order of the Divisional Court, and that the appeal from the orders of ROSE, J., was too late, and the argument was heard subject to the objection.

J. Bicknell, for the appellants. The question turns on the construction of section 7 of the Land Titles Amendment Act, 52 Vict. ch. 20 (O.). That section provides that a plan shall not be binding unless some sale is made according to such plan. The inference clearly is that as soon as

Argument. a sale is made according to the plan, the plan becomes binding and cannot be amended without the order of a judge, who, before he has jurisdiction to make the order must hear "all parties concerned." Clearly, all the owners of lots are "parties concerned," and are entitled to be heard: *Roche v. Ryan*, 22 O. R. 107. All the purchasers of lots upon the plan acquired a right in the street in question analogous to the rights acquired in a square, and these rights cannot be taken away without their consent, or at all events, without giving them an opportunity of expressing their views: *Pettingill v. Devin*, 35 Iowa 344. Moreover, the appellants shew that when they purchased, one of the inducements held out was the use of the Parade, and the respondents, who held out these inducements, cannot now close the Parade in breach of the representations then made.

A. G. Murray, and R. U. McPherson, for the respondents. The appellants are not "parties concerned" within the meaning of the section. The piece of land that has been closed is nothing more than a street, and it is in no sense a park or square, which was intended to be kept open for the public benefit. The affidavits filed on behalf of the appellants do not shew that any inducements were made by the respondents. The mere exhibition of a plan is not sufficient to make it incumbent upon the vendors to forever afterwards keep the whole of a large estate in the same condition in which it is when the plan is exhibited: *Carey v. City of Toronto*, 14 S. C. R. 172; *Squire v. Campbell*, 1 M. & C. 394. Registration of the plan makes no difference in this respect: *In re Morton and St. Thomas*, 6 A. R. 323. The lots owned by the appellants are situated so far from the street in question that the owners can have no possible interest in it. There is no pretence that any right of way or anything of that kind is interfered with, and there was, therefore, no necessity for giving the appellants any notice of the application to amend the plan. After the order amending the plan was made, sales of lots, which include portions of the

former street, were made, and it is now too late to rescind the order under which these sales have been made: R. S. O. ch. 44, sec. 53, sub-sec. 10. Argument.

J. Bicknell, in reply.

June 25th, 1895. HAGARTY, C. J. O. :—

There seems to be no doubt as to the appeal being only to this Court.

The Land Surveyors Act, R. S. O. ch. 152, sec. 65, empowers the amendment of a plan by the High Court or a Judge thereof, etc., and directs that "an appeal shall be from any such order to the Court of Appeal."

The Registry Act, R. S. O. ch. 114, sec. 86, is almost in the same words, and gives the appeal to this Court.

52 Vict. ch. 20, (O.) amending the Land Titles Act, allows amendments or alterations in plans by the High Court or a Judge, or where the lands are not in the county of York, by the County Judge of the county where the lands lie, "and an appeal shall lie from any such order to the Court of Appeal."

The Common Pleas Division rightly held that they had no jurisdiction. I understood it to have been admitted on the argument before us that if the appeal should have been against the orders of the learned Judge, it was too late, although in time if it lay from the Divisional Court.

I think it is too late, and I do not see why the clause in the Judicature Act, as to the time for notice, etc., should not apply.

But as the practice on the point seems in some confusion, I think it better to express my opinion that the application, even if properly before us, cannot succeed on the merits.

We had occasion in *Carey v. City of Toronto*, 11 A. R. 416, to examine the authorities, and I am strongly of opinion that they govern this case.

I do not understand that our statute as to filing and registering plans creates any fresh obligation on vendors of property different from or beyond that arising on

Judgment. a sale of land on a plan, or according to a plan exhibited
HAGARTY, at the time of sale, or referred to for identifying the lot
C.J.O. or parcel sold by reference to the plan, or as exhibited
thereon.

I assume, from the meagre statements in the appeal book, that in the appellant McIlmurray's deed, his lot is described as being lot 291 on Plan M. 77 filed in the Land Titles Office.

The block of land included in this plan comprised some fifty or sixty acres, divided into about 300 lots, having generally about fifty or sixty feet frontage, and intersected by many streets.

It fronts on the lake. A portion of say twelve or thirteen acres of the block lies south of the old Lake Shore road, from which a street leads to another street called a Parade along the water's edge. Four-fifths, at least, of the whole block is north of the Lake Shore road.

The order of the learned Judge, on the owners' application, and, apparently with the assent of all persons interested in lots south of the Lake Shore highway, closed up the street marked "Parade," but left a street called Superior avenue running across the range of lots, and across the Parade to the water's edge.

The appellant McIlmurray purchased lot 291 on this plan, on a street marked as Burlington street, with a range of lots between him and a street called Stanley avenue, south of which lie two ranges of lots between it and the Lake Shore road.

The distance from the appellant's lot, in a direct line, to the Parade, appears to be about 400 yards, and by the streets, about 440 yards, about one-fourth of a mile, all cut up into building lots. His interest in the "Parade" seems to be wholly as a place fronting the expected town or village, to which he could resort, and no question as to interruption of view or prospect, etc., arises.

It is not necessary again to go over the authorities discussed at length in *Carey v. City of Toronto*, 11 A. R. 416; 14 S. C. R. 172.

Lord Cottenham's language in *Squire v. Campbell*, 1 M. & C. 459., is specially referred to, and the decision of Knight Bruce, V. C., in *Randall v. Hall*, 4 DeG. & Sm. 343, where it would appear that the purchaser of a lot sold by reference to a plan was only entitled to rights of way over the road or street adjoining it, and leading into the nearest highway. See this case and others in 1 Dart's Law of Vendors and Purchasers, 6th ed., p. 136.

Judgment.
HAGARTY,
C.J.O.

No fraud or actual misrepresentation is shewn in the present case, and I am unable to see how any contract, express or implied, arose on this sale according to the plan filed, under which the appellant could claim to have this street called "The Parade" always kept open.

We can easily fancy a case in which it might be of vital interest to most of the inhabitants of a sea side or lake side town to retain a handsome water frontage or marine Parade along the town. We are dealing here with two parcels of the street or Parade, each of which is about 220 yards long, along the water front. I cannot think that the appellants can legally object to these being closed, and their appeal must be dismissed.

BURTON, J. A. :—

The only question before us on this appeal is whether the appellants were "parties concerned" within the meaning of section 7 of 52 Vict. ch. 20 (O.).

It has been decided in England, after some conflict of opinion, by Courts whose judgments are binding upon us, that the mere exhibition of a plan on the sale of a lot forming part of the property laid out on that plan will not give the purchaser the right to say that all the other parts of the property exhibited on such plan shall for ever after continue in the same state in which it was exhibited upon the plan, unless it is expressly made part of the contract at the time of the sale.

A different rule prevails in most of the States of the Union. There it has been laid down in repeated authori-

Judgment.

BURTON,
J.A.

ties that if the owner of land lays out and establishes a town, and makes and exhibits a plan with various spots of spare ground such as streets, squares, etc., and sells lots with clear reference to that plan, the purchasers of those lots acquire every easement, privilege and advantage which the plan represents as belonging to them.

Our own Legislature has so far followed the American rule as to provide that when such a plan or survey has been filed and registered and lots sold according to it, the former proprietor has no longer the power to make any change in it.

It is true the same Act of Parliament makes provision for an amendment through the intervention of the Courts, but only on hearing all parties concerned.

It is not shewn that there was any verbal contract in this case, that the plan should remain in its then state, and if there was one, it was merged in the deed, which makes no reference to such a contract, but I should not feel disposed to put a narrow construction upon the words used in the Act, seeing that it was intended when once a sale had been made according to the plan, that the proprietors' power to interfere with it should cease.

If, for instance, it had been shewn that the proprietors had, at the time of the sale, made a representation to the purchaser that "The Parade" should be kept open; that he purchased relying on such a representation, and paid an additional price in consequence, I should find it very difficult to say that he was not a "party concerned" within the meaning of this Act of Parliament. It is not necessary to go the length of saying that the Judge would be bound to make any different order than that which he did make, but the plainest principles of justice and fair dealing would seem to shew conclusively that such a person would have a right to be heard.

It is because such a case is not made out, that I concur in dismissing the appeal. The affidavit does not shew who produced the plan, or that any representation was made by the owners or any one on their behalf in reference to

the Parade to induce him to purchase. It was a matter so essential to the appellants' case to shew that the representations were made by the owners that the only conclusion I can arrive at, is that it could not be shewn.

Judgment.

BURTON,
J.A.

As we agree in dismissing the appeal, it is not necessary to express any opinion as to the appeal being in time. The inclination of my mind is to hold that it was in time. The only right to appeal is given by the 7th section of this statute, and it is there given without any limit as to time.

OSLER, J. A.:—

The only point decided in the Supreme Court in *Carey v. City of Toronto*, 14 S. C. R. 172, was that the plaintiff, having accepted his lease in accordance with a registered plan different from that which had been exhibited at the sale, and which shewed the lane to be closed which the latter had shewn to be open, was bound by the terms of his lease and had, for that reason, no claim to a right of way over the lane shewn upon the plan exhibited at the sale. That case is, therefore, no authority for the proposition that when a plan has been registered, no one can have an interest in the streets laid out thereon, beyond those necessary to give him a right of way over the road adjoining the lot he has purchased, and thence by the nearest road to the highway. The Legislature has declared that in no case shall a plan, though filed and registered, be binding on the person filing or registering the same, unless a sale has been made according to the plan. Once the owner has made a sale of a lot on the plan he cannot close any street thereon, and thereby alter the plan at any point, however distant from the lot sold, at his own will and pleasure. He must apply to the prescribed Court or Judge for leave to do so, and this leave can be granted only on hearing "all parties concerned"—a very wide description of the interest which may give the purchaser of a lot a right to shew why the plan, as registered, should be maintained. A representation made to him by the vendor at the time

Judgment.

OSLER,
J.A.

of sale, as to the use of a particular street or square, or other plot apparently not intended to be built upon or enclosed, such as the Parade in question here, would be, in my opinion, quite sufficient to make such purchaser a "party concerned," however distant therefrom his lot might be situated. But this ought to be very clearly made out, and especially so when such lot is in fact, as in this case, situate at a very great distance from that part of the survey which is proposed to be altered. I concur in holding that the representation here relied upon is not sufficiently made out, and, therefore, considering the distance of the appellants' property from the Parade, and its relative situation with regard to it in other respects, it appears to me that they have not shewn that they were, in fact, parties interested so as to entitle them to oppose or reverse the order of Mr. Justice Rose. The case of *Bartlett v. Bangor*, 67 Me. 460, illustrates the law which prevails in many of the American States on this subject.

MACLENNAN, J. A. :—

I agree in the judgment just delivered by the Chief Justice, and have but little to add to the reasons which he has given.

In saying that a plan, though filed and registered in the land office, shall not be binding on the person filing it, or any one else, unless some sale has been made according to it, the Legislature means no more than that the person or persons to whom sales have been made shall be entitled to maintain the plan so far as their interests may require, and, therefore, no alteration is to be made without hearing all parties concerned. It would be very strange, if, in such a case as the present, a plan comprising about 300 lots could not be altered without notifying persons who had no interest whatever in the alteration proposed to be made, and I see nothing in the Act to warrant such a construction. The order in question was made upon the consent of, or upon notice to, all parties interested in the

lots lying south of the Lake Shore road, and the present applicants are persons interested somewhere north of that road, we are not told just where, with the exception of Mr. McIlmurray, who says he is the owner of lot 291, on the plan, having purchased it from Jenkins in the year 1889. This lot 291 is about a quarter of a mile from the Parade in question, which is the subject of the alteration complained of, and there is no suggestion that the conveyance confers any right or interest in anything whatever outside the lot itself. The affidavit, however, states that the use of the Parade was one of the inducements held out to him to purchase land on the plan, and that he would not have paid the price he did for his lot but for that inducement. He also says that the closing of the Parade will depreciate the value of his land and deprive him and his family of access to the water, except at the foot of Superior street. Upon this statement, I think we must assume that there is nothing in the appellant's deed giving him any interest in that part of the plan in question; and I think the remaining part of his statement is altogether too vague to enable us to say that he has shewn any equitable ground entitling him to be regarded as a person concerned in the proposed alteration, and, therefore, who ought to have been notified of the alteration. He does not say in what form, or by whom, the inducement was held out to him to which he refers, nor whether it was by the vendors or by any one for whose acts the vendors would be responsible.

I think, therefore, that no one can object to the alteration who has not some legal or equitable interest in that part of the plan proposed to be altered, and that for want of any such interest the appellants rightly failed in their application.

Judgment.
MACLENNAN,
J.A.

Appeal dismissed with costs.

EASTMURE V. CANADA ACCIDENT ASSURANCE CO.

Principal and Agent—Rival Employer—Clashing of Interests—Dismissal.

To act as agent for a rival insurance company is a breach of an insurance agent's agreement "to fulfil conscientiously all the duties assigned to him and to act constantly for the best interests of (his employer)," and is sufficient justification for his dismissal.

Judgment of the Queen's Bench Division affirmed.

Statement. THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division.

The plaintiffs were general insurance agents carrying on business at Toronto, and the defendants were an insurance company incorporated for the purpose of carrying on the business of accident insurance and the insurance of plate glass against breakage or damage. The plaintiffs had been agents for several insurance companies whose business the defendants were taking over, and negotiations took place between the plaintiffs and defendants in connection with the appointment of the plaintiffs as agents for the defendant company. Several draft agreements were exchanged between the plaintiffs and defendants with regard to the terms upon which the plaintiffs were to become agents for the defendants. In all of these drafts, and in the agreement as finally executed, it was declared that the functions which should be fulfilled by the plaintiffs, as chief agents of the defendants, should be "to negotiate ordinary accident, plate glass, employers' and general liability insurance." The agreement entered into, which was not under seal, was dated the 1st of December, 1892, though it was not in fact finally completed until some days after this, and by it, by clause 13, the plaintiffs agreed "to fulfil conscientiously all the duties assigned to them and to act constantly for the best interests of the company." In the last of the draft agreements submitted by the defendants to the plaintiffs in the course of the negotiations the defendants inserted in this clause the words "agree not to accept the agency of any other accident insurance

company during the continuance of this contract," but the plaintiffs refused to accept this, stating in their letter (3rd December, 1892), returning it, that it was impossible for them to accede to it in view of the position in which their business outside of Ontario was placed, and that as their office was a general one, they ought not to be bound by a restriction of this nature, but they added that they would agree "not to accept the agency for Ontario of any other accident company," without obtaining the consent of the defendants thereto, and the agreement was then signed with the omission of the clause objected to by the plaintiffs, with some other immaterial changes. Statement.

At the time of the plaintiffs' appointment as agents for the defendants, they had, unknown to the defendants, been appointed general agents for Canada of a company incorporated for the purpose of insuring plate glass, but they had only acted on one occasion for them. Disagreements arose very soon between the plaintiffs and the defendants, and the plaintiffs entered into negotiations with the Plate Glass Company by which they became chief agents of that company. The defendants having learned of this wrote to the plaintiffs complaining of their action as a breach of the agreement between them as set forth in plaintiffs' letter of the 3rd December, 1892, before referred to, and of the 13th clause of the agreement, and dismissed the plaintiffs from their employment.

The action was brought to recover damages for this dismissal and was tried at Toronto on the 29th of January, 1894, before STREET, J., who, on the 5th of February, 1894, gave judgment in favour of the defendants.

This judgment was affirmed by the Queen's Bench Division and the plaintiffs appealed, and their appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 29th of May, 1895.

Osler, Q.C., for the appellants. The judgment appealed from proceeds upon an erroneous assumption as to the

Argument. nature of the plaintiffs' employment. Plate glass insurance is entirely distinct from accident insurance. It is true that accident is an element in all kinds of insurance, but the insurance of plate glass is not properly comprehended in the term accident insurance. A contract of agency does not imply exclusive service and to obtain the exclusive right to an agent's service, there must be a distinct agreement: *Thompson v. Havelock*, 1 Camp. 527. The evidence here is that the plaintiffs refused to accede to such a stipulation.

Cassels, Q.C., and *A. Bruce*, Q.C., for the respondents. The agreement of the 1st of December, 1892, must be construed without reference to the drafts of agreements and the correspondence: *Inglis v. Buttery*, 3 App. Cas. 552. Taking that agreement by itself, it is clear that the plaintiffs in accepting the agency of a rival insurance company have committed a breach of the agreement. They cannot be allowed to place themselves in a position where their interest and their duty may conflict, *Pearce v. Foster*, 17 Q. B. D. 536; *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339.

Osler, Q.C., in reply.

June 25th, 1895. HAGARTY, C. J. O. :—

A full examination of the evidence, oral and written, in this case leads me to full agreement with the judgment appealed from.

The plaintiffs' entering into this agreement with the other company, clearly a rival and competitor with the defendant company in Ontario, seems to me a sound reason for the defendants dispensing with their services.

Their doing this was equally inconsistent with their special undertaking at the time of execution of the agreement, as it was with the general scope and meaning of the clause that they "engage to fulfil conscientiously all the duties assigned to them and to act constantly for the best interests of the company."

The insuring of plate glass in Ontario was equally the

business of the defendant company as of the other company with which the plaintiffs thought proper to ally themselves.

Judgment.

HAGARTY,
C.J.O.

It was suggested, rather than argued, before us, that as the defendant company had not obtained their license to insure plate glass till July, 1893, and had not such license at the date of the agreement with the plaintiffs, they could not make their acceptance of the other plate glass agency a cause of dismissal. I can find no notice of any such objection in either of the judgments below.

My learned brother MacleNNan has pointed out that the evidence does not bring the case within the statutes. In any event I cannot see how, even if the objection were sound, it would lie with the plaintiffs to urge such a defence to their conduct, as they had knowledge of the whole facts, and for the time they were with defendants they duly received their stipulated commission on the plate glass business. The dismissal was on grounds wholly unconnected with the licensed or unlicensed rights.

MACLENNAN, J.A. :—

I am of opinion that this appeal fails.

I think the question turns wholly upon article 13 of the contract, whereby the plaintiffs became bound "to fulfil conscientiously all the duties assigned to them, to act constantly for the best interests of the company, and always to comply strictly with the instructions which have been or may be given to them by the manager or other person duly authorized to instruct them."

It was contended that the correspondence which led up to this final agreement, and in which the proposed terms were discussed, could be looked at; but I do not think that can be done. In *Inglis v. Buttery*, 3 App. Cas. 552, at pp. 558, 571, cited by the respondents' counsel, it was held that the Court could not, for the purpose of construing the agreement of the parties and finding out their intentions,

Judgment. look at matter which was erased on the face of the deed,
MACLENNAN, but which was still legible. So neither can we look at
J.A. the discussions contained in the correspondence which led up to the final agreement.

The simple question, therefore, is, was there a breach of the agreement. The plaintiffs' duties, as mentioned in article one, were to negotiate ordinary accident, plate glass, and employers' and general liability insurance for the defendant company in the Province of Ontario, and they agreed to fulfil conscientiously all their duties, and to act constantly for the best interests of the company. It is admitted by Mr. Eastmure in the clearest terms that part of the business which he and his co-plaintiff began to do for the defendants under the agreement between them was plate glass insurance, and the contention of the appellants is that it was no breach of their agreement to undertake the agency of another company for the Dominion engaged exclusively in that line of business. I think it is too clear for argument that such a contention cannot be maintained. How is it possible for the plaintiffs to act constantly, in the plate glass business, for the best interests of the defendants, and at the same time do the same kind of business for one or more rival companies in the same business? If they could act for one rival company they could equally act for more, and the plaintiffs could not possibly act constantly for the best interests of the defendants while also acting for any number of others.

It was, however, contended that the defendants had no license, and therefore no legal authority, to do plate glass business at the time of the dismissal, and that no such license had been obtained until July afterwards. If the plate glass business which had been done by the plaintiffs on behalf of the defendants had been without license, and therefore contrary to law, the plaintiffs could owe no duty to the defendants to continue that business, and their undertaking to do that kind of business for another company would appear in that case to be no breach of their agreement. I am, however, unable to find that it is proved

that the defendants had not, at the time of the agreement and thence until the dismissal, the requisite license, if any such was then required by law. Judgment.
MACLENNAN,
J.A.

The plate glass business, with regard to license, is governed by section 49 of the Insurance Act, R. S. C. ch. 124, which provides for a license for that kind of business only in case the Minister of Finance, with the approval of the Governor-in-Council, shall determine that it is proper or necessary to be issued.

The evidence offered on this point was merely two issues of the *Canada Gazette*, of the 22nd and 29th July, 1893, more than two months after the dismissal, containing the government return of insurance companies, indicating that on the 22nd July the defendants were licensed for accident business, and on the 29th July for both accident and plate glass business. If the company had no license and if a license was by law necessary to do plate glass business at and prior to the plaintiffs' dismissal, it was their duty to prove the fact beyond all possible doubt, which I think they have not done.

The appeal must, therefore, be dismissed.

BURTON, and OSLER, JJ.A., concurred in the result.

Appeal dismissed with costs.

HENDERSON V. BANK OF HAMILTON.

Banks and Banking—Special Deposit—Action—Damages—Costs.

Statement. THIS was an appeal by the defendants from the judgment of STREET, J., reported 25 O. R. 641, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 6th of June, 1895.

J. J. Scott, for the appellants.

L. G. McCarthy, for the respondent.

The appeal was confined to the question of costs, the appellants contending that as the total amount paid into Court by them was more than the plaintiff was entitled to, they should not have been ordered to pay costs.

June 25th, 1895. The appeal was dismissed with costs, the majority of the Court (MACLENNAN, J. A., dissenting), holding that having regard to the wording of the statement of defence, the moneys paid in must be dealt with as separate and distinct sums.

ADAMSON V. ROGERS.

Covenant—Lease—Improvements—“Buildings and Erections”—Earth-filling.

A covenant by the lessor in a lease of a parcel of land covered by water to pay at the end of the term for “the buildings and erections that shall or may then be on the demised premises,” does not bind him to pay for crib-work and earth-filling done upon the parcel in question by which it was raised to the level of the adjoining dry land and made available as a site for warehouses.

Judgment of the Chancery Division reversed.

THIS was an appeal by the defendant from the judgment of the Chancery Division. Statement.

The action was brought to compel the defendant to grant the renewal of a lease, but when the action came on for hearing before MACMAHON, J., this claim was abandoned, and, by consent, the parties agreed that the question to be determined should be, what, if anything, the plaintiff was entitled to under a provision in the lease, that if a renewal were not granted, “it shall be lawful for the (lessor) at the expiration of the term hereby granted to take the buildings and erections that shall or may then be on the demised premises at such price or sum as shall be fixed” by arbitration. The action was then referred to His Honour Judge McDougall for trial. The land in question was a water lot in front of the Esplanade, in the city of Toronto, and at the time the lease was made it was covered by water to a depth of several feet. After the lease was made, piles were driven in, and the lot was filled in with earth to the level of the adjoining land, and sheds and other buildings were then put up. The plaintiff contended that he was entitled to payment for the earth-filling. A question also arose as to the area of the property included in the lease, but it is not necessary to set out the facts as to that point. The lease contained a covenant by the lessee to insure “the houses or buildings to be erected by him on the demised premises.”

His Honour Judge McDougall, on the 11th of May, 1894, gave the following judgment in favour of the defendant :—

Judgment.
[McDOUGALL,
Co. J.

This is an action brought by a sub-lessee to recover from the assignee of his lessor the value of certain improvements alleged to have been made by him upon the demised premises, and the value of which he claims he is entitled to have paid him by the defendant under a clause of the lease expressly providing for such a claim in the event of a renewal of the lease being refused.

Two questions have arisen upon the threshold of the enquiry, the determination of which must be arrived at before any evidence is gone into as to value or amounts. The first and most important of these is, do the improvements alleged to have been made come within the meaning of the words defining what the lessor has to pay for? The second question is, does the description of the lands demised cover the whole extent of the lands alleged to have been improved and to have been occupied, used and enjoyed by the lessee claiming the indemnity?

I will consider the questions in their order, for it is plain if the first point is decided unfavourably to the plaintiff that his action must entirely fail.

The clause in the lease, which is dated 26th October, 1874, from A. M. Smith to James Adamson (the plaintiff is the administrator of James Adamson), sets out in full a covenant to renew for a further term of forty years, upon receiving six months' notice of the desire or request of James Adamson, his heirs or assigns, to renew the lease, for the further term, at an increased rent to be determined by arbitration, but the covenant to renew is qualified and limited by a proviso in the following terms:

"Provided always that instead of granting such other lease it shall and may be lawful for the said party of the first part, his heirs or assigns, at the expiration of the term hereby granted, to take the buildings and erections that shall or may then be on the said demised premises at such price or sum as shall be fixed and determined by three persons to be chosen in the same manner as above provided for for the purpose of determining the increased ground rent of the said demised premises."

Then follows a covenant by Adamson, his heirs and assigns, that he will insure and continue to keep insured the houses and buildings to be erected by him on the said demised premises, in some good Canadian or British insurance company, for a sum of at least \$2,000.

Judgment.
McDOUGALL,
Co. J.

It is admitted that there are no buildings and erections on the demised premises in the common and ordinary acceptation of these words, in respect of which the plaintiff is entitled to be paid for; but the improvements for which the plaintiff claims under the words is the value of filling in with earth, the water lot demised, to about the level of the adjacent Esplanade. This filling when it was originally done had been preceded by a protection work of piling along a greater portion of the west side and across the south end of an extension of the lot, (which extension it is claimed is included in the demise), and along part of the eastern side of the lot. The object of this piling was to keep the earth used in filling within the boundaries of the demised lot. These piles, except at the south end of the extension, have since become of no value for protection work, because the adjacent land-owners on both the east and west sides of the lot have also filled in their lots with solid earth, and any piling done or remaining in existence in the soil is of no value, as it is not now needed for its original purpose. The filling-in of the adjacent lots took place before the expiration of the first term granted by the lease in question, so that at the date of the expiration of the term, the piling, except at the south or harbour end of the lot, had utterly ceased to possess any intrinsic value to any owner or occupant of the lot.

The simple yet difficult question is, is earth filling a building and erection within the meaning of the lease?

The first thing that strikes one on reading the proviso is that the words are "buildings and erections," not "buildings or erections"; the words are conjoined, not disjoined, and are apparently used in a synonymous sense. In Stroud's Dictionary under the word "building" it is stated that what a building is must always be a question of degree.

Judgment. The masonry on the sides of a canal is not sufficient to constitute a building. A London street, though paved and fenced with stone-work, would yet be land, whilst the Holborn viaduct would be a building: *Regina v. Neath Canal Navigation Co.*, 40 L. J. M. C. 197, per Lord Blackburn.

**McDOUGALL,
Co. J.**

I find in an American case, *Pratt v. Duncan*, 36 Minn. 545, also reported 32 N. W. R. 709, that it was held that filling in and grading grounds about a building already erected was not work connected with the erection, alterations or repairs of the building within the meaning of a Mechanic's Lien Act.

It would appear that the head lease was made between Sarah Boulton and one George Cary. There were no improvements on the land in question at the date of the lease, for there is a covenant on the part of Mrs. Boulton that if the lessee built on the demised premises within the first five years of the term, she, Mrs. Boulton, would advance some four hundred pounds for the purpose, which advance should be a charge on the term, to be repaid with interest at six per cent., on or before the 1st day of June, 1858. The lessee agrees to insure the houses or buildings to be erected by him on the land, in a sum at least equal to four hundred pounds, and to assign the policy to the lessor; and the proviso in this lease, if no renewal is granted, is to take the buildings and erections that shall or may be on the lands. The sub-lease of Smith to Adamson is in the same language, both as to the renewal clause and proviso; and by the insurance clause he agrees to insure the houses or buildings to be erected by him on the demised premises for the sum of at least \$2,000.

The Smith sub-lease is evidently copied, word for word, from the Boulton lease, except as to the option of purchase clause, and the clause to make advances to build.

In written contracts words are to be understood in their common and popular sense.

In Wilberforce's Statute Law, at p. 122, it is said that "the first rule on the subject is that the words are to have their

ordinary grammatical meaning, that which naturally and obviously belongs to them, and has been given them by common usage, in the common language of mankind." Judgment.
McDOUGALL,
Co. J.

In Elphinstone, Norton and Clark on the Interpretation of Deeds, at p. 47, it is stated that the rule as to written contracts is as follows: "When the words used in a deed are in their primary meaning unambiguous, and when such meanings are not excluded by the context, and are sensible with respect to the circumstances of the parties at the time of executing the deed, such primary meanings must be taken to be those in which the parties used the words." Now, what is meant by a primary meaning, as appears in the same work at page 48, is "not the primary etymological meaning, but either (1) the meaning usually affixed to the words at the time of the execution of the deed, by persons of the class to which the parties belonged; or (2) the meaning in which the words must have been used by the parties, having regard to their circumstances at the time of execution; or (3) the meaning which it can be conclusively shewn, that the parties were in the habit of affixing to the words."

This last clause must be received with the qualification that evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. The general rule then may perhaps be expressed better in the language of Chief Justice Tindal, in *Shore v. Wilson*, 9 Cl. & F. at p. 565: "The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves."

A building is a fabric or erection for use or occupation; it must constitute a fabric or edifice; it must be of a substantial or permanent character intended for use or occupation. Here the original parties to the head lease

Judgment. evidently intended the words "buildings and erections" to refer to houses and buildings in their common and ordinary sense. The lease provided for their erection, and provided for the loaning of money by the lessor to effectuate this purpose, the insurance of the thing erected, and the policy to be assigned as security to the party advancing the money.

**McDOUGALL,
Co. J.**

It seems to me a very forced interpretation to conclude that the parties intended by the use of the words "buildings and erections" improvements of every kind, or that it would cover earth-filling, the making of ground, or the raising up of the natural surface of the land covered with water, to the level of the adjacent land by depositing earth thereon.

The language of the sub-lease to Adamson from Smith copies exactly the words of the head lease; and I do not see anything in the evidence or document itself to warrant the conclusion that any different or extended meaning was intended to be attached to the expression "buildings and erections" in the Smith lease.

I am therefore of opinion upon the first question stated, that it should be answered by holding that the earth-filling sought to be recovered for in this case is not covered by the words "buildings and erections," and therefore the plaintiff must fail.

If it should be deemed that I am in error in this conclusion, it may become necessary to arrive at a determination of the second question.

[The learned Judge then dealt with the question of description.]

On the 18th of June, 1894, this judgment was reversed by the Chancery Division, the following judgments being delivered:

BOYD, C.:—

The term "building" has been called an ambiguous word; certainly it is a flexible one, which takes shape and

scope from its connection. It has been applied to a "tug": *Judgment. Mitchell v. City of London Fire Ins. Co.*, 12 O. R. 706, 15 A. R. 262, and to a "wall": *Bowes v. Law*, L. R. 9 Eq. 636. In this case of a water lot it may well be applied to the cribbing and breast-work, which is placed to keep in earth, and also to the filling up by means of earth, whereby the lot becomes solid land, available and used for the purposes of business and traffic. Warehouses have been placed on the foundation thus formed, and by this means the water lot has been greatly increased in utility and value.

The terms in the lease are "buildings and erections," both flexible and comprehensive, and not to be limited by the same words, when used in connection with structures upon land.

The filling in of earth, etc., was the "erection" of a foundation whereon to build the house, and such foundation is as much a part of the building as a cellar would be, which is formed by excavation in an ordinary dwelling-house. "Erection" is a more comprehensive term even than "building": *Bidder v. Trinidad Petroleum Co.*, 17 W. R. 153.

I cannot agree with the construction of these words as passed upon by the learned Judge.

Nor can I come to his conclusion as to the area of the lot. [The learned Chancellor dealt with this question and continued:]

I would, therefore, remit this case to the Judge for the damages to be assessed according to these findings and the costs of appeal should be paid by the respondent.

FERGUSON, J.:—

What the learned trial Judge has called the "earth filling" of the water lot is that with which he deals first in his written judgment. He is of the opinion that this cannot properly be considered to fall under the meaning of the expression "buildings and erections" used in the lease, and that for this reason the plaintiff cannot properly, in the circumstances, make or sustain a claim in respect of it.

Judgment. It should, I think, be borne in mind in endeavouring to ascertain the real meaning of this expression that the parties were dealing in respect of a lot covered by many feet of water, over which it was contemplated that there might or would be buildings and erections by the plaintiff, the tenant, and in reading the words the contracting parties employed, one must place himself as nearly as possible in the position occupied by them at the time, and deny himself no light or information that they had.

FERGUSON, J.

The manner in which this work was done by the plaintiff is clearly shewn by the evidence. It was this: He had piling driven around, or for the most part around the boundaries of the lot, and several cribs were sunk for the purpose of stability, the water being some fourteen feet deep. This being done, the plaintiff filled in on the inside of the piling, so as to form a surface of the whole lot, about four feet above the water level, and some eighteen feet above the surface of the land under the water of the lot as it was before this work was done, and it is admitted that this surface is firm and suitable for receiving any building, etc.

Counsel was unable to say that had the property been put into this way or shape and a house erected upon it the sub-structure would not be part of the house. The argument was, that because the owners of the adjoining properties had, after this piling was done by the plaintiff, taken advantage of it and filled in their lots also, the piling done by the plaintiff became thereby of no service, and that apart from the piling there had been only filling in by the plaintiff, which filling in alone could not properly be considered to fall under the expression "buildings and erections." I cannot take that view.

Both the words "buildings" and "erections" are words of many and varied significations, and I cannot entertain any opinion or arrive at any conclusion but that the piling and filling in, about three-fourths of which were below and one-fourth above the surface of the surrounding water, placed and put there for the purposes intended, constituted

a structure falling under and within the true meaning of Judgment. the expression "buildings and erections," as used by the FERGUSON, J. parties to the contract at the time it was made.

And I am of the opinion that the fact of the adjoining proprietors having filled in their lots, as above stated, could not and did not change the character of the work, whatever difference, if any, this should make in estimating, in the circumstances, the price that should be paid for it.

As to the other question in dispute, I am of the opinion that it is shewn that this water lot "I" has been authoritatively extended southward to the Windmill line, and that what was really leased by the plaintiff was this lot from the Esplanade to the Windmill line.

On both the questions argued before us, my opinion is in favour of the contention of the plaintiff. I agree as to the disposition of the costs made by the Chief of the Court.

The defendant then appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 20th of May, 1895.

Robinson, Q. C., and J. H. Macdonald, Q. C., for the appellant. This earth-filling does not come within the words "buildings and erections," and the plaintiff is not entitled to payment of the cost. It is mere preparatory work. If it is a building or erection, at what stage of the filling-in process did it become so? Suppose the filling-in had stopped a foot below the surface of the water, would it be a building or erection then? The case is very like *Pratt v. Duncan*, 36 Minn. 545, where it was held that filling-in and grading a lot was not part of building operations. *Mitchell v. City of London Fire Ins. Co.*, 12 O. R. 706, 15 A. R. 262, is relied on in the judgment below. But there the tug was held to be a "building," because it was the only thing to which the word could apply. *Bowes v. Law*, L. R. 9 Eq. 636, is also relied on, but the wall in question was held to be a building, because it was used as part of a building. The

Argument. insurance clause throws much light on what the parties were thinking of. [The learned counsel then dealt at length with the question of description.]

Laidlaw, Q. C., for the respondent. The words "buildings and erections" must be construed with reference to the land or land covered with water upon which they are to be "built or erected." What in some cases would be a building would in other cases and within the meaning of other contracts or agreements not be such, and in the same manner what in one case would be an erection in the other case would not be: *Beacon Life Ins. Co. v. Gibb*, 1 Moo. P. C. N. S. 73. The word "erection" in its etymological signification is an apt word to cover and include the cribbing and earthwork constructed in the manner set out in the evidence. In *Manners v. Johnson*, 1 Ch. D. 673, a bay window was held to be a building. In *Pocock v. Gilham*, 1 C. & E. 104, a wooden advertisement hoarding was held to be a building or erection. In *Regina v. Whittingham*, 9 C. & P. 234, a scaffold was said to be an erection. In *Barwell v. Winterstoke*, 14 Q. B. 704, a wooden trough carrying water to a mine was held to be an erection. A greenhouse is undoubtedly an erection: *West v. Blakeway*, 2 M. & G. 729. In *Openshaw v. Evans*, 50 L. T. N. S. 156, a millwheel was held to be a messuage or building. In *Mitchell v. City of London Fire Ins. Co.*, 12 O. R. 706, 15 A. R. 262, a tug was said to be a building. In *Carr v. Fire Assurance Ass'n*, 14 O. R. 487, fixed and moveable machinery, boiler and boiler connections, etc., were held to be included in the term building, and a wall may be a building: *Child v. Douglas*, 5 D. M. & G. 739; *Bowes v. Law*, L. R. 9 Eq. 636.

Robinson, Q. C., in reply.

June 25th, 1895. BURTON, J. A.:—

If it really was the intention of the parties to the lease upon which this enquiry has arisen, that the filling-in of the lot should form the subject of compensation, they have been very unfortunate in the selection of the terms they have used to express their meaning.

If we are, as is said, to look at the position of the parties when the lease was being executed and to bear in mind that they were dealing with a lot covered by many feet of water, it furnishes, to my mind, almost convincing evidence that they never contemplated including filling-in in the expression "buildings and erections." They would convey no idea to the mind of any person dealing with this lease years after its execution, that in taking an assignment of it, he was becoming liable to pay for any thing but the visible buildings or erections that might be found upon the demised premises at the expiration of the lease.

Judgment.

BURTON,
J.A.

I do not dispute the position that the words "buildings and erections" are words of many and varied signification, but I am unable to agree in the view that they would convey to the mind of any one reading them, that they meant the raising of the surface of the land so as to render the demised premises suitable for the erection thereon of buildings to be occupied for residence or business purposes. The parties knowing that they could be made available for such buildings only by the expenditure of a large sum of money would naturally have provided for compensation for such filling-in, if it had been intended to provide for it as part of the improvements to be paid for, in other language than they have chosen.

This was compared to the foundation of a building, but that is a very strained construction; the foundation of a building is, no doubt, part of the building, and would be compensated for as part of the building, but the filling-in here was merely a preparatory step to make the lot itself suitable for receiving buildings in the same way as any building lot in town might require levelling or filling before erecting a building on it, but I apprehend such a claim as the present has never been preferred in such a case. The fact that extensive filling had to be made would presumably be an element to take into consideration when fixing the rent, but if intended to be included in the compensation clause I think they have not used apt

Judgment.

BURTON,
J.A.

words to express their meaning, and that the words they have used must be construed according to the strict, plain, common meaning of the words themselves.

It seems to me to fall within the class of cases referred to by the late Chief Justice Tindal, when he said that evidence *dehors* the instrument for the purpose of explaining it, according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking title under it, for the ablest advice might be controlled and the clearest title undermined, if at some future period evidence of the particular meaning which the party affixed to his words or of his secret intention in making the instrument or of the objects he meant to take the benefit under it might be set up to contradict or vary the plain language of the instrument itself.

If "filling-up" was intended to form the subject of a claim, why not have said so in plain terms, or have used some such term as "improvements," which might have been sufficiently ambiguous to create a doubt or difficulty when looked at in connection with the surrounding circumstances at the time the lease was executed, but the use of such words as "buildings and erections" would rather lead to the inference, when read in view of the circumstances, that the parties deliberately intended to confine those words to their usual and literal meaning.

Upon the second point, as to what passed under the lease from Smith to Adamson, I am also of opinion that the judgment of the learned County Court Judge was correct and should be restored.

[The learned Judge then dealt with the question of description.]

MACLENNAN, J. A. :—

I am, with great respect, unable to agree with the judgment of the Divisional Court on either of the two questions involved in this appeal, and think that the

judgment of the learned County Court Judge, sitting for Judgment.
MacMahon, J., on both points, ought to be restored, and for MACLENNAN,
the reasons very fully stated by him. J. A.

I have nothing to add to what he has said on the question of the extent of the land demised, and I think there is no evidence on which it could properly be found that the lease in question operated upon any land beyond the limits of the original lot I.

As to the other question, I confess I have felt a good deal of difficulty, but upon the whole, I think the proper conclusion is that the ordinary and everyday meaning ought to be given to the words "buildings and erections," and not any unusual or special meaning. There were here two business men agreeing for a lease of a piece of land covered with water, land ordinarily used and doubtless intended to be used for wharf and storage and shipping purposes, the lease to be for eighteen and three-quarter years, with a renewal under certain circumstances for forty years longer. They are agreeing that at the end of the first term, in case of no renewal being granted, the lessee shall be paid for certain improvements which might be made by him in the meantime, and the words they use to describe the improvements so to be paid for are the words "buildings and erections." They have not used the general word "improvements," but words which ordinarily have a well-known and well-understood but limited meaning, and I find it quite impossible to believe that those business men meant or intended that the tenant should be paid for earth filling or for cribbing or piling in connection with such earth filling. I think if that had been intended, they would have said so, and not have left it at all doubtful that such was their meaning. I can fancy the tenant saying: "I want to be paid for earth filling, piling and cribbing, if I do not get a renewal;" to which the landlord answers: "No, I will pay for buildings, and erections of that sort, but for nothing else," and the words we have here are left to stand. If there were here storehouses or sheds or a mill or an elevator, every

Judgment. one would agree that such were truly buildings and erections. No one would have any doubt or hesitation about that. But when it is said that earth filling is a building or erection, that is entirely out of the common, ordinary use of language, and I think we should be in the greatest danger of doing injustice and departing from authority besides, if we were to bind the parties by attaching other than the ordinary, plain and common meaning to the words which they have used.

MACLENNAN,
J.A.

HAGARTY, C. J. O., and OSLER, J. A., concurred.

Appeal allowed with costs.

SWEENEY V. THE CORPORATION OF SMITHS FALLS.

*Municipal Corporations — Local Improvements—By-law—Registration—
R. S. O. ch. 184, secs. 351, 352, 612, 621.*

In constructing local improvements, a municipal corporation must either make an assessment of the probable cost, giving the ratepayers an opportunity of appealing and then, if necessary, make a further assessment to be confirmed by the Court of Revision in the same manner as the first, or they must defer the actual assessment until after the completion of the work, the ratepayers then having the right to appeal. They cannot proceed partly in one way and partly in another without giving any opportunity of appealing from a definite assessment.

A municipal corporation, under the provisions of a general by-law respecting local improvements, determined to construct a sewer, and proceeded to assess the estimated cost on the property benefited. This assessment was confirmed by the Court of Revision. The council then passed a by-law authorizing the construction of the sewer to be proceeded with, and on its completion passed another by-law by which the actual cost, which was much greater than the amount of the assessment, was imposed and assessed upon the property. The council proceeded to enforce this assessment without having brought it before the Court of Revision :—

Held, that the assessment was invalid and could not be supported as a mere alteration of the estimated cost, or as a supplementary assessment.

The provisions of section 351 of the Municipal Act, R. S. O. ch. 184, are imperative and not merely directory, and if a local improvement by-law is not registered within two weeks after its final passing, a ratepayer may shew that it is invalid and successfully resist payment of the local improvement tax.

Re Farlinger and Morrisburgh, 16 O. R. 722, distinguished.

Judgment of MACMAHON, J., reversed.

THIS was an appeal by the plaintiffs from the judgment *Statement.* of MACMAHON, J.

The plaintiffs were the owners of property on Beckwith street, in the town of Smiths Falls, and brought the action to restrain the defendants from enforcing payment of sewer rates levied under a local improvement by-law. The facts were complicated and are dealt with, so far as is necessary, in the judgment.

The appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., and STREET, J., on the 28th of March, 1895.

Osler, Q.C., for the appellants, contended that the proceedings and mode of registration were irregular:

Argument. *Smith v. Fort William School Board*, 24 O. R. 366; *In re Gillespie and Toronto*, 19 A. R. 713; that registration would only avail to cure formal defects and not defects in jurisdiction; and that in any event registration would avail only for the protection of debenture holders: *Georgetown v. Stimson*, 23 O. R. 33, and cases there collected.

Moss, Q.C., and *J. R. Lavell*, for the respondents, cited *Re Farlinger and Morrisburgh*, 16 O. R. 722; *Bickford v. Chatham*, 14 A. R. 32; 16 S. C. R. 235; *Connor v. Middagh*, 16 A. R. 356.

May 14th, 1895. The judgment of the Court was delivered by

OSLER, J. A. :—

The action was brought for the purpose of obtaining a declaration that certain by-laws of the corporation relating to the construction of a sewer, were illegal and void, and to restrain the defendants from making any assessments or levying any taxes against the plaintiffs under any of the by-laws.

The plaintiffs are the owners of land fronting on the east side of Beckwith street, in the town of Smiths Falls. On that side of the street the defendants have constructed a sewer, for the cost of the construction of which the plaintiffs' land has been charged and assessed under by-laws 334 and 338, and the question is whether the proceedings taken by the defendants were effectual to charge the land, or if not so in the first instance, whether by lapse of time or by registration of the by-laws, the plaintiffs were when they commenced this action, precluded from attacking them.

On the 3rd of December, 1888, the defendants passed a general by-law, 264 B., respecting local improvements, pursuant to section 612, sub-section 1 (a), of the Municipal Act then in force, R. S. O. ch. 184, providing the means

of ascertaining and determining what real property would be benefited by any proposed improvement and the proportions in which the assessment for the expense thereof should be made on the various portions of real estate benefited thereby. The object of such a by-law is to make it unnecessary to pass a special by-law for these purposes in each particular case. The defendants' by-law, however, as will hereafter be seen, provides for a great many things not mentioned in section 612 (a).

Judgment.

OSLER,
J.A.

Section 621, sub-section 3 (proviso), enacts that " nothing herein contained shall be construed as authorizing any assessment to be made, or work or improvement to be undertaken, except the same be initiated in some one of the three methods by law provided, namely : (a) either on the report of the engineer or other sanitary officer, and of a committee of the council, recommending the proposed work or improvement for sanitary or drainage purposes, adopted by the council ; or (b) on a petition of the owners of real property benefited, sufficiently signed ; or (c) after due notice as above provided [by 612, 4 (a)] of the proposed assessment, and no petition of the owners of the real property benefited, against the proposed assessment, sufficiently signed, being presented to the council within the time limited therefor " : *Fleming v. City of Toronto*, 19 A. R. 324, 325.

Considerable discussion took place at the trial and was renewed before us as to whether the defendants' engineer had reported on the 3rd of June, 1889, in favour of the construction of a sewer for sanitary purposes on the east side of Beckwith street. The learned trial Judge found that he had so reported. I do not, however, see the extreme importance of the report, because not having been the joint report of the engineer and of a committee of the council, it could not be the foundation of the action of the council, under section 621, sub-section 3 (a), the clause under which the council may initiate the work uncontrolled by a petition for or against it.

Nor was the report one required by section 6 of

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the general by-law, because the report there mentioned is a report upon a local improvement petitioned for by the ratepayers, and in this case there was no such petition. Before the passage of the general by-law there had, indeed, been a petition for a different kind of sewer on Beckwith street, but this had been abandoned, and the work therein mentioned was not that reported on. I only refer to this that it may not be supposed to have been overlooked. It has, in truth, no connection whatever with the case.

The work was in fact undertaken by the council under section 621, sub-section 3 (c), as one initiated by the council and not petitioned against by the owners of the real property benefited. The report of the engineer simply set the council in motion, and upon its adoption, 3rd June, 1889, the engineer, working out the provisions of the general by-law, sections 7 and 8, proceeded to report upon the property benefited by the proposed improvement and the estimate of the probable cost to be assessed against it, and the proportions in which the assessment was to be made on the various portions of real estate benefited. This report was made, and adopted by the council 15th July, 1889. It shews an assessment on each side of Beckwith street in certain proportions against nine lots with a total frontage of 840 feet: approximate estimate of cost, \$2,100; total length of sewer, 1,121 feet, including street crossings.

The report having been made and adopted, the council directed that a notice of the proposed assessment should be published as required by section 612, sub-section 4 (a), in order that dissidents might have an opportunity of petitioning against the proposed improvement. The notice bears date 8th July, so that it was probably framed in anticipation of the adoption of the report, but it was duly published after the 15th July, viz., on the 18th and 25th July, 1889.

There was no petition against the proposed assessment within the month after the last publication of this notice.

At this stage the defendants were in a position to have

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availed themselves of the provisions of section 621, which, for the purpose of enabling councils to avoid the necessity of making supplementary assessments [R. S. O. ch. 184, section 612, sub-section 5, or section 613, sub-section 2 of the Act of 1890, 53 Vict. ch. 50 (O.)] and of ascertaining the exact cost of any work done, as a local improvement, empowers them to make agreements for temporary advances or loans until the completion of the work for meeting the cost thereof, and they are thereby empowered in their option to make the special assessments for the cost thereof after the work shall have been completed and to pass the necessary by-law authorizing the issue of debentures to repay the amount of the temporary loan.

Where the council determines upon this course they should specify in the notice given under section 612, sub-section 4 (a), the probable cost with some reasonable degree of accuracy so that persons interested may not be misled. In such case the amount of the special assessment is not intended to appear in the notice, which need only shew the value of the proposed improvement and the properties benefited thereby, and intended to be ultimately taxed. Such a notice is a clear warning to property owners imperatively calling upon them to petition against the by-law if they are not prepared to entrust the council with unlimited discretion in the matter of expenditure.

Instead of postponing it the council proceeded to confirm the special assessment at once. Accordingly, having adopted the report of an assessment for an improvement to cost \$2,100, they, on the 2nd September, appointed a Court of Revision pursuant to the Act, section 612, sub-section 1, for hearing appeals against the assessment, to be held on the 12th September, 1889. Notice was duly given of such meeting by publication and also by service on the parties interested. The council adopted the procedure under section 622 instead of that provided by section 623 which seems optional, though the rate intended to be imposed was a frontage rate. The notice purports to be based on the engineer's report of the 15th July. It

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contains a general description of the property in respect of which it is given: the nature of the proposed improvement, the estimated total cost \$2,100, and the time and manner in which the assessment was to be payable, viz., in *fifteen* yearly instalments sufficient to cover interest and sinking fund.

The Court of Revision met on the 12th September, pursuant to notice, and the report of the engineer was confirmed as to one Tierney, the only appellant, and as to all the other assessments thereby made.

The cost of the work having been thus ascertained and the special assessment therefor completed, the next thing the council should have done, if it was intended to be acted upon at all, was to pass a by-law authorizing the construction of the sewer at the cost so ascertained and providing for the levying of the rate necessary to meet it at the time and in the manner fixed by the special assessment as confirmed by the Court of Revision. Instead of this the council, acting as it would seem under some of the provisions of their general by-law 264 B. (sections 14, 15, 16), on the 16th September, 1889, instructed the clerk to advertise for tenders for the construction of the work. From the 7th October, 1889, until the 30th June, 1890, tenders were under consideration, and that of one Foster was finally recommended and adopted.

On the 30th July, 1890, a contract was entered into between Foster and the defendants for the execution of the work for the sum of \$3,300, being \$1,200 more than the amount provided by the assessment.

On the 1st July, 1890, 53 Vict. ch. 50, sec. 38 (O.), had come into force, consolidating and amending all the local improvement sections of the Municipal Act. It made no change in the law, so far as the proceedings of the council in this case are concerned.

On the 7th October, 1890, the council passed by-law 324, to authorize the construction of a sewer along the east side of Beckwith street, etc., describing generally its location. This by-law recites that the council desire to con-

struct a sewer as described, under the local improvement by-law 264 B.: that a contract for its construction has been executed by Foster, and enacts simply that the construction of the sewer be authorized and proceeded with.

This is such a by-law as would be appropriate in a case where the council was proceeding under section 621, authorizing the construction of the work and deferring the special assessment for its cost until its completion.

This is evidently what the council intended to do, looking at the sections of their general by-law, 14, 15, 16, 17 before referred to. These require (1) a special assessment to be made and confirmed in the first place, (2) then tenders to be called for, and when the contract has been awarded (3) the mayor is to be authorized to arrange with banks, etc., pursuant to the provisions of the statute, for providing the money necessary to carry on the work to completion in anticipation of the special assessment therefor. It looks as if the council, on passing by-law 264 B., had been under the impression that it was necessary to adopt both modes of procedure in every case, and had failed to see that the Act had not authorized this to be done, and that in fact one was not consistent with the other.

By the 1st December, 1890, the sewer was nearly completed, requiring no more than an expenditure of about \$100 on some trifling matters in the following spring, and the engineer so reported.

On the 16th March, 1891, the defendants passed another by-law (334), which is the main subject of the attack in this suit. It recites a report of the engineer and its adoption by the council (which may be that of 3rd June, 1889), and that a by-law had been passed that the sewer should be constructed as a work of local improvement, and that the expenses of the work should be assessed and levied upon the property described, and that the cost of the sewer should be temporarily provided for and that a special assessment for the cost thereof should be temporarily provided for, and that a special assessment for the cost thereof

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J.A.

Judgment. should be made upon the said real property after the said work should be completed.

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J.A.

Unless the last recital is to be taken as referring to the provisions of the general by-law, sections 15, 17, 18, it is erroneous, no other by-law having been passed than 324, of the 7th October, 1890. The by-law further recites that temporary advances had been made of \$3,475 for the cost of the work for the repayment of which a special assessment of \$278.84 was necessary to be raised annually for *twenty* years to pay the interest on and to discharge the debt as the same became payable.

It is then enacted that it shall be lawful for the mayor to borrow \$3,475, and to issue twenty debentures of the town for \$278.84 each, payable 31st December, 1891, and of each of the next succeeding twenty years, representing in all the sums scheduled for principal and interest, at five per cent.

The debenture debt, besides being secured by the annual special frontage rate on the property described and immediately benefited is "further guaranteed by the corporation at large."

On the 4th May, 1891, the defendants passed another by-law (335) to correct a supposed mistake which had occurred in the former in making the debentures payable in twenty-one years, instead of twenty years.

And on the 15th June, 1891, another by-law (338) was passed "for the assessment and levying by means of a special rate the cost of the sewer laid and completed on the east side of Beckwith street, in the town of Smiths Falls."

This by-law recites that the town has constructed the sewer; recites Brodie's report of the 15th July, 1889, and that the sewer has cost \$3,475 to complete it; and that the assessment of \$2,100 was insufficient to pay the cost thereof; that by sub-section 5 of section 612 of R. S. O. ch. 184, [this should have been section 613, sub-section 2, the Act of 1890 being then in force] power is given to municipal councils to make a second assessment for any local improve-

ments in case the first proves insufficient; and that the council desired by the by-law to make another assessment to pay the cost of the sewer. Then it is enacted that "in lieu of the assessment hitherto made," the following be made (setting forth the lots and new assessment amounting in all to \$3,475), and that the sum of \$3,475 shall be levied in accordance with the provisions of by-law 334 and amending by-law 335, but always, nevertheless, according to the foregoing assessment.

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OSLER,
J. A.

No Court of Revision was appointed to hear appeals against this assessment, and it never was, in fact, confirmed by any such Court.

In my opinion the defendants' proceedings were not merely irregular, they were utterly wrong in essentials, and no legal rate or tax is imposed by them on the plaintiffs or their property. Unless they are saved by the registration of by-laws 334 and 335, a point which I will presently consider, it seems to me, with deference to the learned trial Judge, perfectly clear that the plaintiffs must succeed, as in justice they ought to succeed, in this action.

The defendants have evidently altogether misapprehended the manner in which they are authorized to exercise their powers under the local improvement sections of the Municipal Act. When they determine to execute a work of local improvement one of two courses is open to them. 1. They may ascertain the cost of the work beforehand by procuring the report of an engineer, making a special assessment for the amount necessary to meet it, proceeding before the Court of Revision to confirm the assessment, and then embodying the result in a by-law for the execution of the work and for levying the special assessment. When this has been done, all parties interested have had the notice required by law, with the opportunity of appealing to the Court of Revision, and no additional cost can be imposed upon them except under the provisions of section 612, sub-section 5, or section 613, sub-section 2, of the Act of 1890, that is to say by means of an additional assessment which is to be made in the

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J.A.

same manner as the first, and in respect of which, therefore, all parties must have an opportunity of appealing as before to a Court of Revision. The 2nd or alternative course which the council may adopt in order to avoid the necessity of making an additional or supplementary assessment, is that provided for by section 621, namely, to proceed with the work when the necessary time for petitioning against it has expired, to borrow the money necessary for meeting the cost and to defer making the special assessment until the work has been completed and its whole cost, therefore, known. When this course is pursued, nothing is necessary at the outset but to pass a by-law, as the council did here by by-law 324, to authorize the construction of the work. Such by-law should also authorize them to procure the temporary advances to meet the cost of construction, an authority assumed in the present case to have been sufficiently conferred by the provisions of the general by-law. Then, the work having been completed and its whole cost ascertained, the business of making the special assessment begins and is carried out as before, through the medium of the engineer's report and the Court of Revision. The final by-law for raising the amount of the special assessment thus confirmed and repaying the temporary advances is then passed.

The provisions of the defendants' general by-law 264 B., so far as they came under section 612, sub-section 3 (a), may be applied in working out the first stage of either of these courses, but what the council did in the present case was to begin as if they meant to adopt the first course, ascertaining the cost of the work in the first instance and making and confirming a special assessment therefor of \$2,100. This was the only assessment of which the parties interested had notice, the only one in respect of which they ever had an opportunity of appealing, and the only one confirmed by any Court of Revision.

Having thus led every one to suppose that the cost of the work was to be \$2,100 only, payable with interest and sinking fund in fifteen yearly instalments, the council,

instead of passing a by-law to levy this special assessment and making their contract with reference to it, some months afterwards adopted the other course, letting a contract for the execution of the work (30th July), for \$3,300, passing by-law 324, 7th October, 1890, appropriate to that course, and on the 16th March, 1891, when the work had been completed, passing by-law 334, which expressly shews the course the council were pursuing and that the special assessment for the cost, then amounting to \$3,475, was intended to be made after such completion and was to be made payable in twenty yearly instalments instead of fifteen as originally provided.

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OSLER,
J.A.

This special assessment never was in fact made. No notice of it was given to the parties interested and no Court of Revision was ever appointed or held to hear appeals against, or to confirm it. The assessment of \$2,100 was, as these proceedings shew, necessarily abandoned.

I pass over the by-law of the 4th May, 1891, (335) which was passed merely to correct a clerical error in by-law 334, and which, apart from it, has no force or vitality.

The council then attempted to get over the difficulty in which they began to find themselves, by passing the by-law of the 15th June, 1891, (338) as if for a supplementary or additional assessment, enacting that in lieu of the assessment of \$2,100 theretofore made, another assessment of \$3,475 should be made in accordance with the provisions of by-law 334.

This was for at least two reasons a perfectly futile proceeding: 1. It is not a by-law providing for a supplementary or second assessment, the first having proved insufficient, but for a different and larger assessment in lieu of the former; and 2. if it could be treated as providing for a second assessment that assessment has never been brought before or confirmed by a Court of Revision.

The only assessment, therefore, which is being enforced is an assessment arbitrarily made by the Council without notice to the parties affected and without their having ever had an opportunity of appealing to a Court of Revision.

Judgment.

OSLER,
J.A.

The rates attempted to be imposed on the plaintiffs by the by-laws in question are for this reason illegal and cannot be enforced.

The defendants, however, rely upon the fact that by-laws 334 and 335 have been registered, and contend that this having been done, and no motion having been made to quash or set them aside within the time limited by law they became by force of section 352 absolutely valid and binding on the municipality according to the terms thereof. Section 351 enacts that every by-law for contracting any debt by the issue of debentures for a longer term than one year and for levying rates therefor on the ratable property of the municipality shall be registered by the clerk of the municipality in the prescribed Registry Office within two weeks after the final passing thereof. Section 352: Every such by-law so registered and the debentures issued thereunder shall be absolutely valid and binding upon the municipality, according to the terms thereof, and shall not be quashed or set aside on any ground whatever unless an application or action to quash or set aside the same be made to some Court of competent jurisdiction within three months from the registry thereof.

By section 353 it is optional with the municipality to register by-laws for the issue of debentures passed under the local improvement sections of the Act.

By 54 Vict. ch. 42, sec. 11 (O.), two sub-sections were added to section 352, which, however, were not in force when the by-laws in question were registered. If they had been, applying, as they do, to the case of local improvement by-laws alone, I should have thought that they would not aid these by-laws, because they appear only to validate by-laws where an assessment has been made which it is their object to enforce and carry out. Here, as I regard it, no assessment has been made. It is not necessary to decide whether under the Act as it formerly stood a valid registration would cure anything more than a defect in form or substance, so far as the by-law ordained, prescribed or directed anything within the proper com-

petence of the council to ordain, prescribe or direct (section 331), leaving a jurisdictional defect open to attack, or whether the party might obtain such relief by way of action to restrain the enforcement of the rate as could be granted without quashing or setting aside the by-law. In the case at bar there was, in my opinion, no valid effective registration. If the municipality desire to get the benefit of the stringent provisions of the Act they should at least be careful to observe the conditions on which only they can do so.

Judgment.

OSLER,
J.A.

Section 351 provides that the by-law shall be registered within two weeks after its final passing, and it is only a by-law so registered which, in the absence of attack within the prescribed time, becomes absolutely valid and binding. Here the by-law was not so registered, for the principal by-law, 334, passed on the 16th March, 1891, was not registered until the 20th May. The registration of 335 on the same day does not help it, for the reason already given, viz.: that it is dependent upon and a mere amendment of the former, and by itself has no operation.

I cannot regard the requirement of section 351 as to the time of registration as merely directory, having regard to provisions of section 352, which make the effect of registration dependent upon the performance of the directions prescribed by the former section.

The case of *Re Farlinger and Morrisburgh*, 16 O. R. 722, only decided that registration was not essential to the validity of a by-law, i.e., that its non-registration within two weeks did not *ipso facto* render it invalid.

There seems nothing, therefore, to shield by-law 334 from the attack which has been made upon it, or to disentitle the plaintiffs to the relief prayed that the defendants may be restrained from making and enforcing any assessment or levying any taxes against the plaintiffs or their property thereunder.

On the part of the plaintiffs, there has no doubt been delay, but nothing that they have done or omitted to do has misled the defendants. On the contrary, the plaintiffs have from time to time protested against the action of the

Judgment. defendants either by petition or by paying, on one occasion, this tax under protest, and on another bringing an action to recover it back.

**OSLER,
J. A.**

The appeal should therefore be allowed.

Appeal allowed with costs.

BROWN V. LENNOX.

Landlord and Tenant—Assignment of Lease Without Consent—Covenant to Pay Rent—Assignee's Liability to Indemnify Assignor.

Where a lease containing a covenant against assignment without the consent of the lessors is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is liable, although the consent of the lessors may not have been procured, to repay to the assignor rent accruing due after the assignment which the latter has been obliged to pay.

Judgment of the County Court of York reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of the County Court of York.

Under an indenture of lease, dated the 4th of April, 1888, the plaintiff was the lessee of certain premises in the city of Toronto, and by assignment dated the 19th of December, 1892, assigned this lease to the defendant, who covenanted to pay the rent and observe and perform the lessee's covenants in the lease contained, and to indemnify and save harmless the plaintiff from all loss and expense in connection with the non-performance and non-observance of the covenants or any of them. The lease contained covenants by the lessee to pay rent and taxes, and not to assign or sub-let without leave. The consent of the lessors to the assignment was not obtained, and the assignment was not registered, but the defendant went into possession of the demised premises, and remained in possession for nearly two years. The defendant did not, however, pay the rent and taxes that fell due during

this period. The plaintiff, being threatened with legal proceedings because of the default, entered into negotiations with the lessors, who agreed to accept a surrender of the term upon payment of the arrears. The plaintiff then obtained from the defendant an instrument requesting him to surrender the lease, and agreeing that the surrender should not prejudice the plaintiff's rights under the covenant in the assignment to recover the amount then due; and the arrears were then paid by the plaintiff, and the lease was surrendered. This action was then brought and was tried before his Honour Judge McDougall at Toronto, on the 16th of October, 1894, when it was contended that the agreement for surrender was signed by the defendant under a misapprehension of her rights. The learned Judge so held, and also held that apart from this agreement, there was no right to compel the defendant to pay the rent and taxes, and dismissed the action. Statement.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 10th of September, 1895.

E. D. Armour, Q. C., for the appellant. The want of the lessors' consent to the assignment of the lease did not alter the legal position of the defendant, who, as soon as the assignment was executed by the plaintiff, and delivered to and accepted by her, became in law the assignee of the term subject to the possible right of the lessors to forfeit the lease because of the assignment without leave. If they chose to exercise this right the lease would only be avoided from the time of their election to forfeit, and not having in fact made any election during the period for which recovery is now asked, the defendant is bound to pay: *Hartshorne v. Watson*, 4 Bing. N. C. 178, at p. 182; *Jones v. Carter*, 15 M. & W. 718. Clearly the plaintiff, notwithstanding the assignment, was liable to pay rent, and having paid the rent to avoid legal proceedings, was entitled to recover back from the defendant under her covenant in the assignment the amount so paid.

Argument. *J. H. Denton*, for the respondent. It was the duty of the plaintiff to obtain the consent of the lessors to the assignment: *Mason v. Corder*, 7 Taunt. 9; *Davis v. Nisbett*, 10 C. B. N. S. 572. This consent not having been obtained, it is submitted that the term never vested in the respondent, but even if it did, the lessors certainly had the right to re-enter at any time for breach of the covenant. It is a mere accident that the lessors did not in fact re-enter, but that accident does not give the plaintiff any right to recover under what was in effect a void assignment.

E. D. Armour, Q. C., in reply.

September 25th, 1895. The judgment of the Court was delivered by

HAGARTY, C. J. O.:—

We may accept the learned Judge's findings of fact as correct. 1st. That there was no agreement or understanding proved that the assignee of the term should undertake to obtain the assent of the lessors to the assignment, or pay any fee thereon. 2nd. That no binding agreement is proved to have been executed by the defendant, limiting her liability to future payments.

The case, therefore, stands as an ordinary assignment of a lease without the lessor's assent; a legal possession by the assignee of the assigned premises from the time of the assignment for over two years, during which time two payments of rent to the original lessors became payable, and were paid by the assignor on the landlord's insisting thereon.

The assignment provided that the assignee would pay the reserved rent, and observe and perform the assignor's covenants in the lease therein mentioned, and indemnify the assignor therefrom.

The original lessors never interfered with the assignment, and as far as we can judge from the evidence, would at any time have assented to it if asked so to do.

They had the right to forfeit for breach of the covenant as to assent, but treated the term as still subsisting by demanding and receiving rent from the assignor on his covenants.

Judgment.

HAGARTY,
C.J.O.

The defendant, though much pressed by the plaintiff, would not or could not pay the rent.

It is clear that the defendant and her husband were quite ready and willing that the term should be surrendered—but seem to have been under the impression that such surrender would free them from all responsibility.

The plaintiff tried to prove their assent to pay the arrears on being relieved merely from future liability. In this he fails.

The question seems narrowed down to the point whether the actual surrender and acceptance thereof in April, 1894, destroyed the plaintiff's remedy against the defendant for the then actually accrued rent which the plaintiff had been compelled to pay, and which the defendant had expressly covenanted to pay and indemnify the plaintiff from.

I think the plaintiff has still the right to claim for this accrued and paid rent.

It does not seem that a landlord by accepting a surrender of a term waives his right to sue for and recover accrued rent, nor does an assignor who has had to pay such rent, lose his right to recover on his assignee's covenant therefor.

I consider that the defendant was a consenting party to the surrender; and if no provision was made to the contrary, the respective liabilities of the parties would remain.

I do not consider that the objection as to the non assent to the transfer destroys the plaintiff's rights on the covenant.

If the landlord had interfered or proceeded for forfeiture before any rent had accrued or been paid by the plaintiff, a different question might have arisen.

I think the appeal must be allowed: see Redman and Lyon's Law of Landlord and Tenant, 3rd ed., p. 270; *Hartshorne v. Watson*, 4 Bing. N. C. at p. 182.

Judgment. I also refer to *Crouch v. Tregonning*, L. R. 7 Exch. 88,
HAGARTY, and the distinction there drawn as to the relative position
C.J.O. of the parties.

If the defendant's contention here prevail, the result would be that the defendant here could have occupied the assigned premises for any number of years wholly undisturbed by the landlords, and yet claim exemption from all liability on her express covenant.

Here on the evidence, we find that the landlords knew of the assignment to the defendant, but so far from claiming a forfeiture, insisted on the plaintiff paying the rent to them as he had to do: see *Walrond v. Hawkins*, L. R. 10 C. P. 342; Woodfall's Law of Landlord and Tenant, 14th ed., p. 340.

*Appeal allowed with costs.**

* See *Faulkner v. Booth*, 10 Times L. R. 83.

DOULL V. KOPMAN.

Assignments and Preferences—Exclusive Right of Action—R. S. O. ch. 124, sec. 7 (2)—Release.

A creditor may, after an assignment for the benefit of creditors, and after the execution by him and the other creditors of the assignor of a release of their debts in consideration of payment of a composition, bring an action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment.

Such an action may be brought with the assignee's consent in his name without any order under sub-section 2 of section 7 of the Assignments Act, but without such an order the recovery will be for the benefit of the estate.

Judgment of the County Court of York reversed.

THIS was an appeal by the plaintiffs from the judgment Statement.
of the County Court of York.

On the 30th of May, 1894, the defendant Jacob Kopman made an assignment for the benefit of his creditors to Richard Tew, pursuant to the provisions of the Assignments and Preferences Act. Tew, as assignee, sold the stock in trade as per inventory to Kopman's wife, the defendant Katy Kopman, in consideration of the payment by her to the creditors of forty cents on the dollar of their respective claims. The plaintiffs, Doull and Gibson, were wholesale merchants, to whom Kopman was indebted, and they and his other creditors accepted this payment and executed a release in his favour. Afterwards it was stated that Kopman had concealed part of his stock at the time of the making of the assignment, and an investigation was undertaken by the assignee on behalf of the creditors. The creditors, other than Doull and Gibson, decided, however, not to take any proceedings, and with the approval of the inspector of the estate, the assignee wrote to Doull and Gibson authorizing them to take proceedings if they saw fit for their own benefit. They then brought this action, making Tew a co-plaintiff, alleging that Jacob Kopman had fraudulently concealed part of his stock in trade, and that these goods were in the possession of Katy Kopman, and they asked that these goods

Statement. should be delivered up to them or their value paid to them. No order was obtained by them under sub-section 2 of section 7 of the Assignments Act, authorizing them to bring the action in the assignee's name for their own benefit.

The action came on for trial before his Honour Judge McDougall, at Toronto, on the 6th of February, 1895, and was dismissed on the ground that it could not be maintained without this order.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 11th September, 1895.

F. J. Roche, for the appellants, contended that the defendants could not raise an objection of this kind; that an order was necessary only to define the rights of the creditors as between themselves, and that having the consent of the assignee to bring the proceedings no formal order was necessary. He also contended that in any event the action was of such a nature as not to come within sub-section 1 of section 7 of the Assignments Act, and that it was only in respect of actions within that first sub-section that an order was necessary, relying on *Campbell v. Hally*, 22 A. R. 217.

J. Shilton, and *J. B. McLeod*, for the respondents.

September 20th, 1895. The Court allowed the appeal without costs, and ordered a new trial, stating, however, that the action ought to be framed as one by the assignee in the nature of an action of deceit, or for fraudulent appropriation of the goods in question, and as against the defendant Katy Kopman, alleging collusion on her part. The Court also intimated that in the absence of an order under sub-section 2 of section 7 of the Assignments Act the recovery, if any, would be for the benefit of the estate. Leave to amend was given.

FIELD V. HART.

Exemptions—Execution—R. S. O. ch. 64, sec. 2—Bills of Sale and Chattel Mortgages—Description.

An execution debtor can do as he pleases with the statutory exemptions and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor.

Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue and is not to be left to the sheriff to deal with.

Judgment of the County Court of Ontario reversed.

"One piano, Dominion make, number 2773," is a sufficient description in a bill of sale.

Judgment of the County Court of Ontario affirmed.

THIS was an appeal by the plaintiff and a cross-appeal Statement. by the defendant from the judgment of the County Court of Ontario, in an interpleader issue.

On the 5th of February, 1894, Thomas Stevenson gave to the plaintiff as security for an advance then made by him, a chattel mortgage upon his household furniture at that time in his possession in his house, and this mortgage was duly registered. The description in this mortgage was admittedly sufficient, but the mortgage was not renewed. On the 3rd of April, 1894, the plaintiff made a further advance to Stevenson, who then gave to him a bill of sale of the same furniture, which was still in his possession, and this bill of sale was duly registered. One of the articles included, was described as "One piano, Dominion make, No. 2773." The makers of this piano were The Dominion'Organ and Piano Company, and the number of the instrument was painted thereon, and was correctly given in the bill of sale. The description of the other articles was admittedly insufficient. After this Stevenson agreed to rent from the plaintiff part of a house owned by him, and he moved to this house taking the furniture in question with him. The plaintiff, for part of the year, was in the habit of living in the same house to look after farm work, and while Stevenson was living in the house, and while the plaintiff was also living there, the defendant recovered judgment against Steven-

Statement. son, and, under the execution issued pursuant thereto, the furniture in question was seized.

The issue was tried at Whitby on the 10th of June, 1895, before his Honour Judge Burnham, who held that what had been done was not equivalent to a taking of possession by the plaintiff, and found in favour of the defendant, except as to the piano, which he held to be sufficiently described; and he ordered the plaintiff to pay all the costs of the issue. Upon motion in term before the same learned Judge, this judgment was adhered to.

The plaintiff then appealed, and the defendant cross-appealed, and the appeal and cross-appeal were argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 13th of September, 1895.

F. J. Travers, for the appellant. There was a sufficient taking of possession to cure the irregularity in the description in the bill of sale, and at any rate the plaintiff is entitled to fall back upon the chattel mortgage in which the articles in question were admittedly sufficiently described. Even if, however, the plaintiff cannot do this, the bill of sale being good as between the parties, operated as a sale by Stevenson to the plaintiff of such of the articles as are exemptions within the Act respecting executions, for in no case could these exemptions be seized by the execution creditor, and judgment in the plaintiff's favour for the piano and the exemptions would entitle him to nearly all the goods in question. Even if the judgment below is right on the merits, it is wrong as to costs, which should have been divided in view of the divided success.

Moss, Q. C., for the respondent. There was no change of possession in this case. The defendant was tenant of the part of the house, and while he was tenant he was entitled to possession, even as against the lessor, so that the goods were in his possession, and not in the possession of the lessor. The question of exemptions is one with which the sheriff must deal. *Prima facie* the execution creditor

is entitled to seize all the goods, but when the sheriff proceeds to deal with them he must recognize the right to exemptions, if any such right exists. The judgment is wrong in holding that the piano was sufficiently described. The name of the makers was not fully given, and some further identificaion was necessary. Argument.

F. J. Travers, in reply.

September 25th, 1895. The judgment of the Court was delivered by

OSLER, J. A. :—

The cross-appeal should be dismissed with costs. It is evident that the piano is sufficiently described in the bill of sale by reference to the name of the makers, and the number of the instrument.

As to the appeal: the other goods mentioned in the bill of sale, so far as they are in question, are not properly described for the purposes of the Act, within the decisions on the subject, and I think it impossible to say that the County Judge was wrong in holding that there had been no actual and continued change of possession before the execution was lodged. The possession was the same as it had always been, viz., the mortgagor's. The moving of the goods by him to rooms rented in a house of the mortgagee, where he continued to use them, effected no change of possession. The mortgagee did not take them, and they were no more in his possession after the move than they were before.

I do not see of what use it can be to the claimant to set up the chattel mortgage, in which no doubt the goods are properly described. In his evidence at the trial, he said it had been discharged, and no doubt the intention was that the bill of sale should be substituted for it. However that may be, the mortgage was not renewed, and the execution came in just after the expiry of the year. Against it, therefore, the mortgage would be void under the Act.

Judgment.

OSLER,
J.A.

Then as to the exemptions. If this question was raised at the trial, as the plaintiff says it was, I think the plaintiff would be entitled to succeed as to them, a sale valid as between the parties having been proved. The execution creditor could not seize them, and the law does not prevent the debtor from mortgaging or otherwise disposing of them. As to such goods, therefore, I cannot see how, in favour of the execution creditor, the Chattel Mortgage Act applies. The Judge seems to have treated the question as one purely of law, and to have held that it was a matter strictly personal to the debtor, and to be settled between him and the sheriff. He says he does not consider that "the trial of the issue can be in any way affected by a question of this kind." And he does not say that the question had not been raised at the trial. It is unfortunate that there is no allusion to it in the evidence, but that may be because the point was treated as one of law, and there may have been no necessity for calling any witness, unless possibly the sheriff or bailiff who made the seizure.

I cannot agree with the ruling of the learned Judge on this point. The plaintiff is, in my opinion, entitled to recover as to the exemptions, and it should be referred to the clerk of the County Court to ascertain and report which of the goods in question in the issue, other than the piano, were in fact goods exempt from seizure under the Act.

The appeal must, therefore, be allowed with costs.

If the claimant succeeds on the reference, he will, of course, be entitled to the whole costs of the issue and proceedings thereon.

If he fails as to part of these goods, the costs should be apportioned, the claimant receiving the general costs of the issue and the execution creditor such costs as he may have been put to in disproving the title of the claimant to those goods in respect of which he fails.

*Appeal allowed with costs, and
cross-appeal dismissed with costs.*

THOMPSON V. GRAND TRUNK RAILWAY COMPANY OF
CANADA.

*Railways—Highways—Cattle—“At Large”—51 Vict. ch. 29, sec. 271
(D.)—Non-suit—Jury.*

Cattle are “at large” within the meaning of section 271 of 51 Vict. ch. 29 (D.) when the herdsman in following one of the herd which has strayed gets so far from the main body that he is unable to reach them in time to prevent their loitering or stopping on the highway at its intersection with a railway when he sees a train approaching.

The question whether cattle are at large or not need not under all circumstances be submitted to the jury. It is for the Judge in that case as in others to say whether there is any evidence for the jury that the cattle were in charge within the meaning of the Act. Judgment of the County Court of Wentworth affirmed.

THIS was an appeal by the plaintiff from the judgment Statement.
of the County Court of Wentworth.

The action was brought to recover damages for running down and killing the plaintiff's cattle at a highway crossing.

The defence was that the cattle were at large upon the highway within half a mile of its intersection with the railway, and were not in charge of any one to prevent them from loitering or stopping on the highway at such intersection.

The action was tried at Hamilton, on the 13th of December, 1894, before his Honour Judge Muir.

It was proved that on the morning of the 8th of June, 1894, the plaintiff's boy was ordered to drive seven cows and a heifer from one part of the plaintiff's farm across the highway to another part thereof through two gates nearly opposite to each other, one on each side of the road. The railway crossed the road on a level about 300 yards south of the gates. Both gates having been first opened, the cattle were driven into the road. The heifer separating itself from the others, ran along the road north; the boy left the cows and ran after the heifer, and overtook and turned it and drove it back after it had run about 100 yards. In the meantime the other cattle, instead of cross-

Statement. ing into the opposite field, started down the road towards the railway, and got within about 100 yards of it by the time the boy had turned the heifer. The heifer continued to follow on past the gate after the other cattle, and started them all on a run towards the railway. They reached the track and remained standing on it before the boy could approach near enough to drive them across it, and the train ran into them, killing two and injuring a third.

On the authority of *Thompson v. Grand Trunk R. W. Co.*, 18 U. C. R. 92, the learned Judge nonsuited the plaintiff and afterwards dismissed a motion to set the nonsuit aside.

The plaintiff then appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, J.J.A. on the 19th of September, 1895.

D'Arcy Tate, for the appellant. The cattle were not "at large," within the meaning of section 271 of the Railway Act, 51 Vict. ch. 29 (D.), but were, within the meaning of that section, in charge of some person to prevent their loitering or stopping on the highway at its intersection with the railway. In the case of *Thompson v. Grand Trunk R. W. Co.*, 18 U. C. R. 92, followed by the learned Judge, horses were being driven along the highway, without any fastening; and it is not usual for horses to be driven in this way. The usual custom is that they should be led or otherwise kept under control by means of a bridle or halter. On the other hand, it is the universal custom in the country for cows to be driven along the highway in herds, and while so driven, it cannot be said that they are "at large" or turned loose. It is submitted that no other meaning can be given to the words "in charge of," as applied to cows, than that they should be under the care of a herdsman. It would not be reasonable to have its individual attendant for each animal in a herd of cows: *Ibbottson v. Henry*, 8 O. R. 625; *Hillyard v. Grand Trunk R. W. Co.*, 8 O. R. 583; *Hinman v.*

Chicago, etc., R. W. Co., 28 Iowa 491; *Nelson v. Great Northern R. W. Co.*, 53 N. W. R. 1129; *Keeney v. Oregon Railway and Navigation Co.*, 42 Am. & Eng. R. W. Cas. 619; *Grove v. Burlington, etc., R. W. Co.*, 39 N. W. R. 248; *Valleau v. Chicago, etc., R. W. Co.*, 36 N. W. R. 760. The section does not require control, but merely requires that the cattle be in charge of some person. Moreover, if control is contemplated at all, this was at most a mere temporary loss of control, while the section, which uses the word "permit," evidently contemplates some wilful or permanent want of control. The jury should have been asked to find as a fact whether the cattle were "at large" or not. It is possible that if the boy in charge of the herd had remained passive and had not run after the cattle, the accident might not have happened; but it is clear upon the evidence that he acted according to the best of his judgment; and it is well settled that if a person called upon to act suddenly, acts according to the best of his judgment and with reasonable care and capacity, he is not deprived of his remedy if as a result injury follows.

Moss, Q. C., for the respondents. Evidently what the section contemplates is, that cattle must be considered "at large" unless there is some one in charge of them who can prevent them from loitering on the highway. That is the only sensible interpretation to be given to the Act, and that interpretation was placed upon it as long ago as the case of *Thompson v. Grand Trunk R. W. Co.*, 18 U. C. R. 92, which the learned Judge properly followed. These cattle were certainly "at large" in this sense at the time this accident occurred, for at that time it is clear the boy was seeking to regain the control which he had entirely lost. The Act gives the railway an absolute right of way, and if cattle are allowed to loiter on the highway at the intersection with the railway, and injury results, there can be no recovery. It might be different, if, while the cattle are in charge and under control, something suddenly happened to frighten them so that control was temporarily lost, but here the cattle were beyond control before they took fright

Argument. at all, and the boy had gone too far from them to be able to resume control. The American cases cited by the appellant are decided under local statutes, and do not apply, but even in the American Courts the decisions conflict: *Smith v. Kansas City, etc., R. W. Co.*, 58 Iowa 622.

D'Arcy Tate, in reply.

September 25th, 1895. The judgment of the Court was delivered by

OSLER, J. A. :—

[The learned Judge stated the facts as above set out and continued:]

Section 271 of the Railway Act of 1888, [51 Vict. ch 29 (D.)] on which the defendants rely, is substantially the same as section 16 of the Railway Act of 1857, 20 Vict. ch. 12, which has been the subject of numerous decisions.

Its language is as follows: "No horses, sheep, swine, or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless such cattle are in charge of some person or persons, to prevent their loitering or stopping on such highway at such intersection."

Sub-section 3. "If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured."

The plaintiff contends that the cattle were in fact in charge of some person within the meaning of the Act; and that, at all events, the question whether they were so or not, was for the jury.

I do not think it necessarily follows because these cattle were driven upon the road by the plaintiff's servant with the intention of taking them across it, that they must be held under all changes of circumstances which might arise

before he had accomplished^d his purpose, to have been in charge of some person within the meaning of the Act; or that it ought, under all circumstances, to be left to the jury to say whether they were so in charge. It was for the Judge in this case, as in others, to determine whether there was any evidence which could reasonably be submitted to the jury that the plaintiff was not within the prohibition of the Act.

Judgment.

OSLER,
J.A.

The following cases, decided shortly after the passage of the Act of 20 Victoria, may be noticed. It is always emphasized that the whole object of the Act was to secure the public as much as possible against accidents that might happen to railway trains from collision or otherwise.

In *Simpson v. Great Western R. W. Co.*, 17 U. C. R. 57, where a horse escaped from a stable to the highway, and thence, owing to defects in the cattle guard at the point of intersection, got upon the railway and was killed, it is said by the Court (p. 61): "The statute has the effect of making it unlawful for cattle to be permitted to be at large upon any highway within half a mile of the intersection of such highway with a railway or grade, unless the same shall be in charge of some person. Against that the prohibition is positive, and we agree * * that the word 'permitted,' as used in the Act, does not mean that the owner of the animal shall not voluntarily and designedly permit it to be on the highway, but that at his peril it must not be permitted to be there under such circumstances. * * The plaintiff was bound to take care that the horse should not be suffered to get upon the highway near a railway crossing—in other words, it was his duty to prevent it for the safety of persons travelling along the line. The statute amounts to a direct and positive prohibition against any such animal being found upon a road in such a situation without some one being in charge of him; the plaintiff's horse clearly violated that prohibition, for he got from the road upon the railway at the crossing. Having so got upon the railway he was there unlawfully and his owner

Judgment.

OSLER,
J.A.

must take the consequences of any accident that happened to him from the movement of the trains, where no wilful misconduct or negligence in managing the trains is complained of."

In *Thompson v. Grand Trunk R. W. Co.*, 18 U. C. R. 92, the language of the Court is still more emphatic. They held that upon the facts proved, the horses could not be held to have been in charge of the boy who was driving them along the highway to the pasture field, so that he could prevent their loitering or stopping on the highway at the point of intersection with the railway. "In a case such as this," said Sir John Robinson, delivering the judgment of the Court (p. 96), "where the animals get upon the railway in consequence of being allowed to run upon the highway near a crossing, in violation of the statute, and are killed at the point of intersection, the owner can maintain no action for their loss. That consequence is expressly made to follow by the statute, and it cannot be evaded by attempting to throw blame upon the company for neglecting or omitting any precaution on their part, such as sounding the whistle, ringing the bell, etc. * * For the safety of the public the statute throws the loss upon the owner of the cattle in all such cases, and without any qualification as to the company being careful to avoid collision."

To the same effect is *Cooley v. Grand Trunk R. W. Co.*, in the same volume, at p. 96. In both cases the plaintiff was nonsuited.

The question arose again in *McGee v. Great Western R. W. Co.*, 23 U. C. R. 293, upon demurrer. The plaintiff replied to the defence of the statute, that the injury was caused by the negligence of the defendants, and that they could by the exercise of reasonable and proper care and skill have avoided the injury. The present Chief Justice of this Court, said (p. 297): "I think it (the clause as to cattle being at large) bars all recovery against the railway company when the owner comes within the statutory prohibition as to letting his cattle run at large, etc., and that

we should defeat its wholesome object, if we should leave it to be wholly decided by a jury on which side the 'balance of negligence,' as it has been termed, lay. * * I consider the statute framed in the general interest of the travelling public, rather than in that of railway companies or owners of cattle." In this view concurred Draper, C. J., and Morrison, J.

Judgment.

OSLER,
J.A.

That case was approved in the case of *Markham v. Great Western R. W. Co.*, 25 U. C. R. 572 (1866), valuable for its affirmance of the principle laid down in the former as to the purpose and construction of the Act, as well as for the observations in the judgment as to when animals, such as those in question in the present case, can be properly said to be in charge. There it appeared that the plaintiff's son was taking three horses along a road crossing the railway, riding one, leading another, and driving the third, the latter being from 60 to 100 feet in front of him, when it got on the track and was killed. It was held that the horse was not in charge of any one within the meaning of the Act. The present Chief Justice of this Court, in giving judgment, said (p. 574): "We are unable to see how the horse driven from 60 to 100 feet in front of the others, which doubtless were duly 'in charge,' can be said to have been properly under the man's control. The event shewed his utter inability to prevent the animal running on or across the track. If animals usually driven, viz., oxen, pigs, or sheep, have to approach or cross a railway, we should naturally consider them as 'in charge' when the person or persons driving them could readily head them off or turn them if necessary from the track."

Draper, C. J., agreed, and added (p. 576): "Where the evidence for the plaintiff clearly and decisively shews that a horse for the killing of which by their locomotive an action is brought against a railway company was not so in charge, the judge presiding at the trial ought, as a matter of law, to rule that the company have incurred no liability whatever. * * By throwing the responsibility upon the owners of permitting their horses, sheep,

Judgment.

OSLER,
J.A.

swine, or other cattle, to be at large upon any highway within half a mile of the intersection of such highway with any railway or grade, unless such cattle are in charge of some person, and depriving them of any remedy in case of their cattle, etc., being killed, the Legislature make it their interest to diminish one of the risks to which the public are exposed in making use of the railway."

These cases were decided many years ago. I do not find them doubted or disapproved of; and I think we ought to follow them. The later ones, which deal with the question of the company's negligence, seem to echo the view which the Court of Queen's Bench evidently took of the effect of the statute in the earliest case in which it was noticed: *Campbell v. Great Western R. W. Co.*, 15 U. C. R. 498. That was a case of collision with animals getting on the track at a farm crossing, to which the Act does not apply and which is governed by quite different considerations.

I do not understand that from any of these cases it is meant to be inferred that a plaintiff would be without remedy where his animals are taken upon the road attended by a person or persons sufficient to control or manage them under ordinary circumstances, and no doubt, having regard also to the manner in which the particular animals are usually controlled, where without fault on the part of the attendant, they break away from such control and get upon the railway. But that is not this case, the facts of which bring it, in my opinion, very closely within those I have referred to. The boy left some of the cattle standing on the road while he went to recover the one which had run off in a direction where no danger was to be anticipated. How can he be said to have been in charge of the others, within the meaning of the Act? He had got so far away from them that it was impossible for him to prevent them from reaching the track and loitering upon it or to drive them off it when he saw them there before the train could arrive at the point of intersection. As was said in the *Thompson* case, the boy foolishly took it for granted that they would stand still on

the road, but they went on, as they were very likely to do, towards the crossing.

Judgment.

OSLER,
J.A.

I cannot see that under the circumstances, the fact that the animals were cows and not horses, as in the above case, makes any difference. The point is, that they were left unattended. The servant's plain duty was to have driven those which had not escaped, up the road into the field, before going after the heifer. The others were at large on the highway. His attention was withdrawn from them, and while he was absent and thus unable to control their movements, they cannot, in my opinion, be said to have been in charge of any one within the meaning and for the purpose of the Act.

I have looked at all the American cases cited and others. Generally speaking, the statute law on which they were decided is different from ours, but in none of them is there any reasoning which should induce us not to follow the decisions of our own Courts.

I think we can only dismiss the appeal in the usual way.

*Appeal dismissed with costs.**

* See *Phythian v. Baxendale*, [1895] 1 Q. B. 768, under the Highways Act, 1835 (Imp.).

THE CANADA BANK NOTE ENGRAVING AND PRINTING
COMPANY

V.

THE TORONTO RAILWAY COMPANY.

Contract — Printing Debentures — Sale of Goods — Work, Labour and Materials — Statute of Frauds.

A contract to print debentures in a special form on paper supplied by the printers is a contract for the sale of goods and chattels, and not a contract for work, labour and materials, and is within the Statute of Frauds, OSLER, J. A., *dubitante*.
Judgment of ARMOUR, C.J., affirmed.

Statement. THIS was an appeal by the plaintiffs from the judgment of ARMOUR, C. J.

The plaintiffs carried on business as engravers and lithographers at the city of Montreal and brought the action to recover the sum of \$1,779, the price of certain bonds and coupons printed by them for the defendants, in a special form and with special wording, upon paper purchased by the plaintiffs. The defendants refused to accept the bonds on the ground that they were not in proper form, and this action was thereupon brought, in which, among other defences, the defendants pleaded the Statute of Frauds, and it is only as to the question of the application of the statute to a contract of this kind that a report of the case is necessary. The action was by consent referred to a referee, who found in the plaintiffs' favour, but his report was set aside by ARMOUR, C. J., and the action was dismissed with costs.

The plaintiffs appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 23rd and 27th of May, 1895.

McCarthy, Q.C., and W. M. Douglas, for the appellants, contended, upon the point now in question, that the contract was one for work, labour, and materials and not within the statute at all.

Laidlaw, Q. C., and *J. Bicknell*, for the respondents, *Argument*, referred on this point to *Lee v. Griffin*, 1 B. & S. 272; Benjamin on Sales, 4th ed., p. 105; *Isaacs v. Hardy*, 1 Cab. & El. 287; *Wolfenden v. Wilson*, 33 U. C. R. 442; 1 Law Quarterly Review, p. 9.

October 29th, 1895. HAGARTY, C. J. O. :—

An examination of the evidence leads me to the conclusion that the learned Chief Justice was right in holding that it must either be taken as a term of the bargain that the bonds were to be such as would be accepted by the London, New York and other exchanges or that there was no *consensus ad idem*.

[The learned Chief Justice then dealt with evidence and did not discuss the question of law, it being unnecessary to do so in his view of the facts.]

BURTON, J. A. :—

The authorities upon the question of whether the cause of action is for goods bargained and sold, or for work and labour, do not seem, even at this day, to be entirely in harmony. In *Lee v. Griffin*, 1 B. & S. 272, the case referred to by the learned Chief Justice, this language appears in the judgment of one of the Judges (Crompton, J., at p. 275):

“There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labour done, and materials provided, as it could hardly be said that the subject matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labour.”

And Lord Blackburn, in the same case, says (p. 278): “The case of a printer printing a book would most probably fall within the same category”—that is, the action would be for work and labour.

Judgment. If so, it might be difficult to draw a distinction between such a case and the present.
BURTON,
J.A.

On the whole I think that the only true test is as stated by Mr. Benjamin (4th ed., p. 105) that if the contract is intended to result in the transfer for a price from one party to the other of a chattel in which the other had no previous property it is a contract for the sale of a chattel.

I find it impossible to say, therefore, that the learned Chief Justice was wrong in holding that the Statute of Frauds applied, and that the plaintiffs have not shewn a compliance with it by evidence of a completed bargain.

I think, therefore, that the appeal should be dismissed.

OSLER, J. A. :—

If the bargain in this case be within the Statute of Frauds as a bargain for the sale of goods above the value of \$40, and therefore to be evidenced by a written note or memorandum thereof, I see no reason to differ from the learned Chief Justice in the Court below. In that case the letters only which passed between the parties can be looked at, and from them I am unable to gather that the parties ever were *ad idem*.

There is, however, evidence which the referee believed and on which he expressly found, that an oral agreement was entered into by the defendants through their president with the plaintiffs. For myself I should be prepared to accept that finding as supported by the evidence, and if the Statute of Frauds is not applicable to that agreement the plaintiffs should recover. I assent to the proposition that the agreement is one relating to the sale of goods within the statute with much doubt and hesitation. It bears much more the aspect of a contract respecting work, and labour and materials, and but for the concurrent opinions of the other members of the Court and of the trial Judge I think I should have so held. In what respect do these bond forms, the subject of this suit, differ from the case of a deed prepared by a solicitor? In both the

paper and the ink employed in producing the form are furnished by the producer, whose mental skill and knowledge or manual dexterity bring about the result. In both the thing produced is worthless as a chattel—a mere combination of ink and paper—one to be created into a commercial security and the other to become a conveyance, by execution by the parties for whom they are prepared. Yet in the case of the deed it seems to be conceded, as in the case of a printer printing a book it has been decided, that the substance of the contract is work and labour and not the sale of a chattel. In the case of the tailor supplying a coat, a dentist making a set of artificial teeth, a sculptor executing a work of art on material supplied by himself, it is easy to understand that the contract may be regarded as a sale of goods, because the thing made, whether statue, picture, engraving or photograph, is complete, and a chattel, capable, as a finished thing, of sale and use, and not necessarily to or by the person for whom it was at first designed. The passage in Lord Blackburn's judgment in *Lee v. Griffin*, 1 B. & S. 272 at p. 277, points out the distinction: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." Then he illustrates the latter proposition by the case of the attorney preparing a deed and the printer printing a book. Why does it not cover the case of the bond form also? How in that case more than in the others can it be said that there ever was any intention to make anything that could properly become the subject of an action for goods sold and delivered? When these forms were completed were they the absolute property of the producers? Could they have disposed of them—blank forms of defendants' obligations—to any or everybody they pleased? Would not any attempt of that kind have been restrained? See article in 1 Law Quarterly Review, p. 9, *note*. If so, it is

Judgment.

OSLER,
J.A.

Judgment. very difficult to see that the thing so produced was intended to be or could be the subject of a sale to any one. The relation in which the parties stood towards each other is, I should have thought, more accurately described as that of employer and employed rather than vendor and purchaser. Therefore, while I do not absolutely dissent from the view which I understand is taken by the other members of the Court on this point, I concur with reluctance and great hesitation in dismissing the appeal.

OSLER,
J. A.

MACLENNAN, J. A. :—

The first question is, whether the present is a case of contract for the sale of goods within the Statute of Frauds ; or rather Lord Tenterden's Act, and, therefore, within the Statute of Frauds ; or a contract for work, labour and materials, which is not within that Act. The cases on the subject exhibit great variety of opinions expressed by eminent Judges. The case of *Lee v. Griffin*, 1 B. & S. 272, however, seems now to be accepted as correct, and as indicating as nearly as can be done the principle governing such cases. That was an action by a dentist for work and labour and materials in making and fitting a set of artificial teeth for the defendant's testatrix, and it was held that the contract was for a sale of goods within the statute. In *Clay v. Yates*, 1 H. & N. 73, Pollock, C. B., and Alderson and Martin, BB., expressed the opinion that in the case of a work of art, such as a statue or a portrait, in which the work of the artist was worth a great sum compared with the value of the marble or the canvas, the contract might be regarded as one for work and labour.

In *Lee v. Griffin*, that was dissented from, and Blackburn, J., said : " If a sculptor were employed to execute a work of art, greatly as his skill and labour might exceed the value of the marble, the contract would, nevertheless, be a contract for the sale of a chattel." This ruling was applied to the case of a contract for the painting of a picture, between an artist and a picture dealer, by

Mathew, J., in *Isaacs v. Hardy*, 1 Cab. & El. 287. I am unable to distinguish the present case from that of a statue or a painting; or from that of a photograph or engraving, which must be governed by the same considerations. Here was a contract for the manufacture and delivery of a chattel of a certain description, intended to serve a certain purpose. It does not seem to be material that when completed it might not be of much or any value in the market, or to any one else than the person ordering it. The same was evidently the case in *Lee v. Griffin*, for a set of teeth made for one person would be of no use to another.

Judgment.
MACLENNAN,
J.A.

Upon the whole I think the law is correctly expressed by Benjamin (4th ed., p. 105), as the result of the decision in *Lee v. Griffin*, "that if the contract is intended to result in transferring for a price from B. to A., a chattel in which A. had no previous property, it is a contract for the sale of a chattel, and unless that be the case there can be no sale."

I therefore think this case is within the Statute of Frauds.

The next question is, whether there is a sufficient note or memorandum in writing, and after the most careful consideration I think there is not. I feel also bound to say that if I had come to the conclusion that the case was one of work, labour and materials, I do not think the plaintiffs fulfilled the terms of the only bargain which the defendants could upon the evidence be held to have made with them.

I am therefore of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

HAUBNER V. MARTIN.

Contract—Sale of Goods—Statute of Frauds—Memorandum in Writing—Denial of Agent's Authority—Principal and Agent.

A letter referring to the terms of a contract made by an agent, but denying the authority of the agent to make it, is a sufficient memorandum within the Statute of Frauds.

Judgment of the Common Pleas (Division affirmed, BURTON, J.A., dissenting).

Statement. THIS was an appeal by the defendant Martin from the judgment of the Common Pleas Division.

The plaintiffs were merchants carrying on business at the city of New York, and brought the action against John M. Martin and Julius Silberstein to recover \$1,510.23, the price of goods alleged to have been purchased by Silberstein as agent for Martin, who, however, denied Silberstein's authority and pleaded the Statute of Frauds.

The action was tried at Toronto on the 14th of December, 1894, before STREET, J., who found against the defendant Martin on the question of agency, but gave effect to the defence of the statute.

Upon motion to the Divisional Court (MEREDITH, C.J., and MACMAHON, J.), this judgment was reversed, the judgment of the Court being delivered on the 2nd of March, 1895, by MEREDITH, C.J., who, after discussing the evidence as to agency and coming to the same conclusion on that point as the Judge at the trial, dealt thus with the question arising under the Statute of Frauds:—

There remains to be considered the question whether the provisions of the 17th section of the Statute of Frauds stand in the way of the plaintiffs recovering.

If the letter of the plaintiffs to Martin of the 5th of September, the invoices, and Martin's letter to the plaintiffs of the 13th of September, are sufficiently connected to be read together, there is, I think, a sufficient memorandum in writing to satisfy the provisions of the statute.

The letter of the 5th of September informs Martin that

“as per agreement” the plaintiffs had drawn on him on the previous day at three days’ sight for \$1,510.23; the invoices, amounting together to \$1,510.23, describe the goods and give the names of the sellers and the purchaser and the price, and Martin’s letter of the 13th is as follows: “In reply to yours of the 5th inst. I have to say that Mr. Silberstein only had limited instructions to buy certain goods and to a certain amount only. Your draft has not been presented and cannot be accepted, as I do not want the goods purchased by Silberstein, and they are of no use to me. I am advised that the goods are here, but have not interfered with them, and they are subject to your order so far as I am concerned. The goods shewn by your invoice are not what I wanted, and the amount is far in excess of the value of the goods I did want.”

Judgment.
MEREDITH,
 C.J.

Reading these three writings together they contain everything that is required to make a complete memorandum of the bargain, the terms of payment being shewn by the letter of the 5th of September, and all the other necessary matters by the invoices.

The question, as put by Lord Herschell in *Taylor v. Smith*, [1893] 2 Q. B., at p. 69, is “whether either or both of these documents can be said to be, in conjunction with any document incorporated with or referred to in them, or either of them, a memorandum within the statute.” In that case the bargain was by word of mouth. An invoice of the goods was made out containing the names of the vendor and the purchaser, the subject matter and the price. The goods had been shipped to Manchester through a carrier, who, on the arrival of the goods at Manchester, sent an advice note to the purchaser upon which the purchaser had written and signed a memorandum in these words: “Refused. Not according to representation,” and he had written a letter to the plaintiff referring to the goods as “the deals refused by me now lying at Kenworthy’s,” stating that they were not according to representation and much inferior to any St. Johns deals he had seen and refusing to accept the advice note. The indorsed memorandum and the letter were held not to

Judgment. be sufficient by themselves to constitute a memorandum within the statute, but it was pointed out by Lord Herschell that if any of them had referred to or incorporated the invoice there would have been a sufficient memorandum.

MEREDITH,
C.J.

The language of Lindley, and Kay, L.JJ., is to the same effect, and it is, I think, manifest that had there been in that case in either of the documents signed by the defendant a reference to the invoice the memorandum would have been held to be sufficient.

In *Baumann v. James*, L. R. 3 Ch. 508, at p. 511, Wood, L. J., referring to *Ridgway v. Wharton*, 6 H. L. C. 238, said: "In that case instructions were referred to. Now instructions might be either by parol or in writing, but it was held that it might be shewn by parol evidence that instructions had been given in writing and that there had been no other instructions than the written document which was produced."

In *Wilkinson v. Evans*, L. R. 1. C. P. 407, the defendant had returned the invoice of the goods with a note signed by him on the back of it in these words: "The cheese came to-day, but I did not take them in for they were very badly crushed. So the candles and cheese is returned," and it was held that the contents of the invoice were sufficiently referred to by the note on the back of it and that the two together constituted a sufficient memorandum within the statute.

These cases and the case of *Bailey v. Sweeting*, 9 C. B. N. S. 843, are all that need be referred to to shew that the invoices sent by the plaintiffs to the defendant Martin were sufficiently referred to in the letter of the latter of the 13th of September so as to constitute, together with the letter of the 5th of September, a sufficient memorandum in writing to satisfy the statute, unless the fact that Martin's letter repudiates the contract as binding on him by reason of the alleged limited authority of Silberstein prevents his letter being used to complete the memorandum in writing.

In *Buxton v. Rust*, L. R. 7 Exch. 279, at p. 282, referring to a passage which had been quoted from page 66 of his book on Sale, Lord Blackburn, then Mr. Justice Blackburn, said: "I may add with reference to the statement read from Blackburn on the Contract of Sale, page 66, to the effect that 'it seems difficult on principle to see how an admission of the terms of a bargain signed for the express purpose of repudiation can be considered a memorandum to make the contract good,' that the point has been clearly settled since the publication of that book by the decisions of the Court of Common Pleas, which have been referred to, and from which I do not see any reason to dissent; the rule they establish is as logical and more convenient than that suggested by myself."

Judgment.
MEREDITH,
C.J.

In the late edition of Blackburn on Sale (2nd ed.), at p. 63, to the statement in the earlier one to which Lord Blackburn referred is added: "Since this passage was written the point has been decided, and it is now law that a letter written for the purpose of repudiating a contract may be good as a memorandum."

Now the correspondence in the present case shews the terms of the bargain between Silberstein and the plaintiffs, and as the statute does not require that the authority of the agent to bind his principal should be evidenced by a writing, but permits that to be proved by parol evidence, and as the authority of Silberstein to enter into the contract on behalf of the defendant has been proved, I can see no good reason why we may not properly hold on the authority of the cases to which I have referred that the correspondence constitutes a note or memorandum in writing of the bargain between the plaintiffs and the defendant Martin sufficient to satisfy the statute. The bargain is admitted and the terms of it are shewn and it seems to me that the effect of the admission cannot be destroyed because it is coupled with a false denial of the authority of the agent to bind the principal for whom he was acting.

The principle to be deduced from the cases is, I think, correctly stated in a recent work by Ker and Pearson-Gee, on

Judgment. the Sales of Goods Act, 1893, at page 44, as follows: "As all
MEREDITH, that is required is evidence of the terms of the contract,
C.J. and not the written contract itself, or evidence of the fact
of the agreement, even a writing repudiating the contract
is, if it contains the terms thereof, sufficient. Such a case
must, however, be carefully distinguished from those men-
tioned in the note, where the effect of the repudiation is to
leave the terms of the contract in doubt."

I refer also to *McLean v. Nicoll*, 7 Jur. N. S. 999.

In my opinion the appeal should be allowed and the judgment in favour of the defendant Martin reversed, and instead thereof, judgment should be entered in favour of the plaintiffs against him for \$1,510.23 with interest from the 13th of September, 1893, with full costs of suit, and, inasmuch as the whole costs of the litigation have been occasioned by the defendant Martin, he must pay the costs which the plaintiffs have to pay to his co-defendant, and he must also pay the costs of the plaintiffs and of his co-defendant of this appeal.

The defendant Martin then appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 4th and 5th of June, 1895.

' *Robinson*, Q. C., and *D. Macdonald*, for the appellant. There is not sufficient evidence of the contract to satisfy the statute. Before the decision in *Bailey v. Sweeding*, 9 C. B. N. S. 843, it was settled that a repudiating letter was not a sufficient memorandum, but the effect of that case and some more recent ones (*Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Exch. 279; *Elliott v. Dean*, 1 Cab. & El. 283), has been to alter the law to the extent of allowing a letter that repudiates the contract on some collateral ground, or refuses performance for some subsequently arising reason, to be treated as sufficient evidence under the statute. With this doctrine the appellant does not quarrel, but this case is very different. Here there is a denial of any liability; not a mere refusal to

perform the contract. It is a fallacy to say that because agency has been proved the repudiation of the contract on the ground of want of agency is merely collateral. As well might one insist that a denial of the correctness of the price charged, might, if oral evidence of the correctness of the price charged is given, be struck out of the letter relied on, and that letter then treated as a sufficient memorandum. It is not as if the agent had made a contract valid under the statute, and the principal had then attempted to repudiate the agent's authority. In that case the repudiating letter might be disregarded *in toto*, but here the letter is accepted in part and rejected in part, and that cannot be done. See also Browne on the Statute of Frauds, 4th ed., p. 439.

[The learned counsel also contended that the writings did not shew the terms of the contract, and that Silberstein's agency was not proved.]

Cassels, Q. C., and *W. H. Blake*, for the respondents, contended that the denial of the agent's authority did not make the letter any the less evidence under the statute; that the terms of the contract were sufficiently defined, and that the authority of the agent was clearly proved. They also contended that there had been acceptance of the goods and part payment of the price; the argument on these points turning upon evidence, which it is unnecessary to set out, as to the mode of shipment adopted, and as to the terms upon which some cartage charges were paid.

October 29th, 1895. HAGARTY, C. J. O.:—

In deciding the question on the Statute of Frauds, the main point for decision in this case, we must carefully keep separate the other point as to Silberstein being the defendant's agent, and whether he had exceeded his authority.

Our only concern is as to the existence of "some note or memorandum in writing of the bargain made and signed by

Judgment. the parties to be charged by such contract or their agents thereunto lawfully authorized."
HAGARTY,
C.J.O.

I agree with Meredith, C. J., that the defendant's letter brings the case within the authorities so as to satisfy the statute. He has an invoice shewing all the particulars of Silberstein's purchases on his account from the plaintiffs. He specially refers to it, "the goods shewn by your invoice are not what I wanted, and the amount far in excess, etc."

It seems clear that the defendant thus incorporates the invoice with his letter. He admits in writing the particulars of the bargain and sale between the plaintiffs and his agent.

The question of authority is quite distinct. The contract the plaintiffs seek to enforce is that made by the agent for the defendant. The letters admit it in writing so far as the statute is concerned.

I think the case is fully within the principles laid down in the authorities cited in the judgment appealed from, such as *Wilkinson v. Evans*, L. R. 1 C. P. 407, and the late case of *Taylor v. Smith*, [1893], 2 Q. B. 65, in which the subject is discussed by Lord Herschell, and Lindley, and Kay, L.JJ.

As to the agency I think it is fully established as found by the trial Judge and the Divisional Court.

In this view it is not necessary to discuss the argument as to receipt and acceptance, or of treating the agent's acts in New York as if done personally by the defendant.

I do not think we can give effect to the objection as to the large excess of the purchases over the amount anticipated by the defendant.

OSLER, J. A. :—

I am of opinion, agreeing in this respect with the learned Judge at the trial, that there was no delivery and acceptance of the goods in New York sufficient to satisfy the statute. I make no doubt that there was a delivery, and

a delivery with intent to part with the possession and to enable the defendant to obtain the goods before payment of the price. The plaintiffs' letter of the 13th of September, 1894, shews that; and the evidence of one of the railway officials proves that the defendant could have obtained them in Toronto by producing the duplicate receipt and identifying himself as the consignee named therein. But it was a delivery to the transportation company for the defendant, not to Silberstein, and after that delivery the defendant never accepted and received the goods. The plaintiffs contended that there was a delivery and acceptance in New York by Silberstein, who acted as the defendant's agent in purchasing the goods there, but to this is opposed the fact that the plaintiffs, and not Silberstein, were the consignors of the goods to the defendant. And although they required the purchaser to pay for the cartage to the railway station, it is impossible to infer from that, having regard to the fact I have just mentioned, that the delivery to the carters was a delivery to Silberstein, and an acceptance by him for the defendant.

At most the act was an equivocal one, and does not admit of the inference that there was any actual parting with the possession of the goods by the plaintiffs before their delivery on the cars so as to have enabled Silberstein to have disposed of them in New York. "To satisfy the statute, there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with an intention of taking possession as owner": *Phillips v. Bistolli*, 2 B. & C. 511; there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all lien for the price. * * There must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer; and this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract:" *Hinchman v. Lincoln*, 124 U. S. 38. See also *Buldey v.*

Judgment.

OSLER,
J.A.

Judgment.

O'CONNOR,
J. A.

Parker, 2 B. & C. 37, per Holroyd, J., cited and applied in the same case. I do not see on what principle the advance by the plaintiffs of the cartage charges and its repayment by Silberstein or the defendant, can be regarded as part payment so as to take the case out of the statute, as was also contended. It was no part of the price, nor ever treated by either of the parties as such. The most recent case on the subject of acceptance and delivery is *Abbott v. Wolsey*, [1895] 2 Q. B. 97, decided since the passage of the Sale of Goods Act.

We have, therefore, to enquire whether the statute has been satisfied by the other mode provided by it, viz., by "some note or memorandum in writing of the bargain made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

It seems scarcely to have been suggested at the trial that any such note or memorandum could be found in the correspondence, invoice, etc., and the point is not taken in the notice of motion against the trial judgment, though the judgment of the Court below turns upon it entirely.

Where the statute is applicable, the existence of an oral bargain is assumed, which would have been good at common law, but upon which, if not evidenced as it requires, no action can be maintained.

Such an oral bargain, between Silberstein, professing to act as agent for the defendant, and the plaintiffs, was shewn to have been made: the question is whether the proof of it comes up to the requirements of the Act.

I think Silberstein's agency was proved; on that point, also, I agree with the Courts below.

It is contended, and has been so held, that the memorandum of the bargain is found in the plaintiffs' letter to the defendant of the 5th of September, 1894, the two invoices of the 4th of September, and the defendant's letter to the plaintiffs of the 13th of September, the latter referring to, and thus incorporating, the former documents which shew the goods purchased and their price, the terms of payment and the names of the vendor and purchaser.

Judgment.

OSLER,
J.A.

The difficulty which the case presents is this : that while the defendant's letter of the 13th, taken in connection with the other documents, shews sufficiently the terms of a contract made by Silberstein with the plaintiff: *Jackson v. Lowe*, 1 Bing. 9; *Buxton v. Rust*, L. R. 7 Exch. 1, 279; *Long v. Millar*, 4 C. P. D. 450, which is relied upon as having been made by him as agent, and on behalf of the defendant, the letter expressly repudiates Silberstein's authority to make it, and thus, of course, inferentially denies that there is any contract in existence between the plaintiffs and the defendant.

It has been held in the Court below, that the false denial of Silberstein's authority to bind the principal for whom he was acting, does not destroy the effect of the admission. The point seems new, and not to be exactly covered by any of the decided cases, which are: *Bailey v. Sweeting*, 9 C. B. N. S. 843; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Exch. 1, and in the Exch. Ch. 279, and *Elliott v. Dean*, 1 Cab. & El. 283. These are all cases which involved no question of agency, and in which the letter or memorandum of the defendant relied upon as taking the case out of the statute did admit or recognize the fact of a contract having been made between the parties, but repudiated, for some insufficient reason, the obligation to perform it, or liability for its breach. They are all cases of the character mentioned by Lord Blackburn in the first edition of his book on Sale, "where, after a dispute has arisen, a party, in a letter signed by him, recapitulates the whole terms of the bargain for the purpose of saying that the bargain is at end for some reason which is evidently insufficient in law. It has never been decided (he continues) whether such an admission of the terms of the bargain signed for the express purpose of repudiation, can be considered a memorandum to make the contract good." The cases above mentioned, afterwards decided, did determine that point adversely to Lord Blackburn's view, and in *Buxton v. Rust*, he expressed his assent to the rule they established.

Judgment.

OSLER,
J.A.

The present case differs from the above cases in that the contract relied upon was made by the agent of the party sought to be charged, but I think it comes fairly within the principle to be extracted from them, which is that you must find, under the hand of the party, or his agent, a sufficient admission or recognition of the terms of the pre-existing contract, *i. e.*, of the oral contract. The memorandum or note, if consisting wholly of something written by the party charged, must be relied on by the other party so far as it goes, or if incorporating by reference other documents emanating from the latter must assent to the contract as therein stated, and if any term is falsely stated or omitted in the one, or not assented to or falsely denied in the other, the falsity or omission cannot be orally proved or supplied. Where the bargain sought to be established is between the principals, and the party sought to be charged denies it, or does not admit it, or states a false term : *cadit questio*. To prove the bargain, or the true bargain, we should be thrown upon the parol evidence which it was the object of the statute to exclude. But where the dealing is with an agent, and the alleged principal writes something recognizing the terms of the pre-existing contract, but denying, or not admitting, or saying nothing of, the agency, why is not that a sufficient compliance with the statute, the proof of agency not being required to be in writing ? "Some note or memorandum in writing of the bargain signed by the party to be charged by such contract or his agent." What bargain ? What contract ? The contract made by the party or his agent. If the party made the contract and signs the memorandum, he admits the contract ; he can do no less. If the agent made the contract and signs the memorandum, the fact of his agency remains in question. But is an alleged principal signing a memorandum of a contract alleged to have been made by his agent bound also to admit the agency ? In my opinion the statute is satisfied if he admits or recognizes in writing that there was such a contract leaving the question of agency to be proved. In both cases the object

of the Act is attained, and the danger intended to be guarded against avoided, by the evidence of the contract being reduced to writing, so far as the Act requires that to be done, and leaving in both the fact of agency alone to be proved. The note or memorandum is not the contract, but the statutory evidence of the existence of a contract—a bargain: *Leroux v. Brown*, 12 C. B. 801, 824, 825; *Bailey v. Sweeting*, 9 C. B. N. S. 843, Williams, J.; *Maddison v. Alderson*, 8 App. Cas., at p. 488: *per* Lord Blackburn, and *Britain v. Rossiter*, 11 Q. B. D., at p. 127, which, in such a case as the present, is shewn to be the contract of the signer by evidence that it was made by his duly authorized agent. Were we to accede to the defendant's contention we should be holding in direct opposition to the words of the statute that the note or memorandum is the contract, and not merely evidence of it, and that when a contract is made by an agent, the agent is the only person who can make and sign the memorandum; and that the principal cannot do so effectually without admitting the agent's authority. His false denial of that is very different from a false denial of some term of the contract. To admit proof in the latter case of the falsity of the denial would be to admit parol evidence of what the statute requires to be in writing, viz., the real terms of the contract; while in the former to give parol evidence of the fact of agency is no more than what may lawfully be done where the note or memorandum is made by the agent, and the principal asserts the agent's want of authority to make the contract.

Had the agent signed the memorandum the principal might have said he was not my agent. What more does he do when he says: "It is true that such a bargain was made, and on these terms, but the person who made it had no authority—was not my agent?"

For these reasons I am of opinion to affirm the judgment, the denial in the letter of the 13th of September, going only to the agent's authority, and not to the terms of the contract made by him, and admitted by the other parts

Judgment.

OSLER,
J. A.

Judgment.

OSLER,
J.A.

of the letter. Reed on the Statute of Frauds, vol. 1, sec. 394, and Campbell on the Sale of Goods, 2nd ed., pp. 314, 315, may be referred to. *Ockley v. Masson*, 6 A.R. 108, is a case in which the plaintiff recovered on proof of a note or memorandum made by the defendants, oral proof of agency being given and subsequent repudiation by the defendant of his contract being held of no avail.

MACLENNAN, J. A. :—

With much doubt and hesitation I agree with the learned Judges below that there is sufficient evidence of authority from the defendant to Silberstein to buy the goods in question. I also agree with Mr. Justice Street that there was acceptance, but no receipt of the goods. I agree with him that the plaintiffs took the bill of lading or carrier's receipt in their own name, and retained it in their own possession with the intention of keeping control until the goods should be paid for. The question which remains, therefore, is the sufficiency of the note or memorandum signed by the defendant within the Statute of Frauds. The learned Chief Justice came to the conclusion that the letter of the 13th of September written by the defendant, taken in connection with the plaintiffs' letter of the 5th and the invoice, was a sufficient compliance with the statute. After the best consideration I have been able to give to the question, and after for some time being of a different opinion, I have come to the conclusion that the note or memorandum is sufficient. The statute has left the law of agency untouched, and has made no change in the nature of the evidence required to establish it. When, therefore, a question of agency in relation to a sale of goods arises, it is competent to prove by parol not merely that there was some authority, but the nature and extent of it. That is to say you can so prove what the particular goods were which the agent was authorised to buy. That being so I think the defendant's letter of the 13th of September is an admission that Silber-

stein bought the goods mentioned in the invoice, for the price therein mentioned. If it had stopped there all that would be required would be to shew, which might be done by parol, that Silberstein had authority to buy those particular goods, and to agree to the price. But the letter contains a good deal more than the mere statement that Silberstein bought the goods. He says his authority was limited, that he was only authorized to buy certain goods, and to a certain amount only, that he does not want those which were actually bought, and that they are of no use to him, that they are not the goods he wanted and that the amount is in excess of the value of what he wanted. Now, the most all that amounts to is to say that the goods which Silberstein bought and which are specified in the invoice, are not the goods which he was authorized to buy. That merely raises a question which can be settled by parol evidence, namely, the nature and extent of the agent's authority. It is admitted he bought the goods, and if he had authority to buy those particular goods then the bargain is found in the defendant's letter, and the papers therein referred to. The defendant, in effect, says, I admit that my agent made such and such a bargain, but he did not conform to his instructions. The nature and extent of the instructions is a question of agency altogether, and if there was really no want of conformity thereto, then the memorandum is really a memorandum of the true bargain, the bargain which would have been enforceable if there had been no Statute of Frauds.

I am, therefore, of opinion that the appeal should be dismissed.

BURTON, J. A. :—

It having been established to the satisfaction of two Courts that Silberstein had full power to make the purchases in question and to accept the goods, those findings, in my opinion, should not be disturbed.

The questions, therefore, for decision are, first, was there

Judgment.

MAULENNAN,
J.A.

Judgment. a delivery and receipt within the terms of the statute, and
BURTON, if not was there a sufficient memorandum in writing,
J.A. signed by the defendant, to satisfy the statute?

I agree with Mr. Justice Street that there was no such delivery.

The facts are not in dispute, and I take it to be clear law that to satisfy the statute there must be a delivery by the vendor with the intention to place the property within the power and under the exclusive dominion of the purchaser as absolute owner discharged of all lien for the price.

Here the plaintiffs always intended to retain the goods until they were paid for, and I cannot express my views better than by quoting a passage from a judgment of Mr. Justice Holroyd, that as a general rule whenever no fact has been proven shewing an abandonment by the vendor of his lien no actual receipt by the purchaser has taken place. We are brought, therefore, face to face with the question of whether there was a sufficient memorandum in writing signed by the defendant to satisfy the statute.

There is a clear distinction between evidence of a contract and evidence of a compliance with the Statute of Frauds.

The effect of that enactment is that although there is a contract, which is a good and valid contract, no action can be maintained upon it if made by parol only unless there be a note or memorandum in writing of the contract signed by the party to be charged.

The memorandum does not constitute a contract, but is the only evidence of it which the law allows, or, as expressed by Lord Blackburn in *Maddison v. Alderson*, 8 App. Cas., at p. 488, the effect of the statute is to render the kind of evidence required indispensable when it is sought to enforce the contract.

And Brett, L. J., in *Britain v. Rossiter*, 11 Q. B. D at p. 128, after referring to the opinion at one time entertained that the verbal contract was void, adds: "It being clear that no action can be brought on the verbal contract

itself, it is also clear that neither party can be held liable upon it indirectly in any action which necessitates the admission of the existence of the contract," and I fully subscribe to the remark of Chief Baron Pollock, that we should not be always searching for something equivalent to a memorandum.

Judgment.

BURTON,
J.A.

It is, I may say, almost elementary that the note or memorandum of the oral contract, whether by one writing or by the incorporation of other writings referred to in it, is sufficient if it admits even impliedly the essential particulars of the terms of the contract and the parties to it.

This is frequently done by an unqualified reference to the invoice of the goods, but wherever the memorandum states or refers to a term not contained in the invoice, it is clear that it cannot be relied on as an admission; two writings alleging two different contracts can never together form a memorandum in writing of the bargain. If, for instance, there had been a reference to the invoice in the present case, coupled with a statement that as to two or three of the items they were never purchased, or disputing the prices of some of the items in the invoice—how could it in reason be said that there was an admission of the verbal bargain? Which was the bargain, the statement in the invoice or that in the letter? Or as shewn in one case where the purchase was of certain goods at a discount of twenty-five per cent. from a list of goods with prices annexed, and the purchaser signed an order for the goods referring to the list, but not mentioning the discount, it was held that the order was not a sufficient memorandum within the statute, as it did not contain the price: *Goodman v. Griffiths*, 1 H. & N. 574. So in *Cooper v. Smith*, 15 East 103, the defendant wrote a letter recognizing an order entered in the plaintiff's order book, but insisted that the goods had not been delivered in time, thus introducing a new term, which was denied by the plaintiff, and it was held that the plaintiff could not prove by parol that no such term existed.

I do not for a moment dispute that a letter repudiating

Judgment. liability under a contract, may nevertheless amount to a memorandum in writing, if there is an admission of the contract, and its substantial terms are stated.
BURTON,
J.A.

In the cases in which the memorandum under such circumstances has been held sufficient, it will, I think, be found the objection was not to the statement of the contract, but to something which had taken place in the performance of it. Thus in *Wilkinson v. Evans*, L. R. 1 C. P. 407, the Court held that the invoice, on the back of which the letter of the defendant was written, contained all the stipulations of the contract, and that the objection contained in the letter was not to the plaintiff's statement of the contract, but to the manner in which it had been performed.

So in *Bailey v. Sweeting*, 9 C. B. N. S. 843, the letter in substance was: I selected for ready money certain chimney glasses, the price of which was £38-10-6. That which followed was no denial or repudiation of the contract, but a mere statement that for some reason the defendant wished to avoid the performance of it.

But if, in these cases, the defendant, after referring to the conditions of purchase and the non-receipt of the chimney glasses, had said, apart from which I deny that there ever was any such contract as you allege, is it not clear that such letters could not be relied on as admissions of the contract, and that no evidence could be received to shew such denial untrue?

If then such a statement, or a statement that some term of the contract had been omitted, though entirely false, would prevent the letter being relied on as a memorandum within the statute, how do they differ from the present case in which the letter relied upon as an admission commences by a denial of any authority in Silberstein to buy the goods in question, followed by a statement that the goods shewn by the invoice are not what he wanted? I quite concede that that would be no answer, if he had expressly or impliedly admitted the bargain, and it is contended here (although it is conceded that the question

never appears to have been decided), that a repudiation of the contract itself on the ground that the person alleged to have made it had no authority to make it, cannot be treated as an admission in writing by the party sought to be charged, although it may be susceptible of proof that the authority of the agent existed in fact. The answer given to this by the learned Chief Justice of the Common Pleas is that, inasmuch as the authority of the agent has been proved, the effect of the admission cannot be destroyed because it is coupled with a false denial of the authority of the agent, but the answer appears to me to be that there is no admission, unless we strike out that portion of the letter denying Silberstein's authority, and this same argument might be applied to the cases I have referred to, where the alleged existence of a term in the contract inconsistent with the invoice was without foundation in fact.

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BURTON,
J.A.

In neither case, it would seem to me, can it be said that there is an admission of the contract.

It appears to me, with all deference, that when the learned Chief Justice says that the effect of the admission cannot be destroyed because it is coupled with a false denial, he is losing sight of the fact that what is required to be proved here, in order to entitle the plaintiffs to recover, is an admission in writing by the defendant of the bargain. Although the evidence might be quite sufficient to enable the plaintiff to recover, but for the Statute of Frauds, he is disabled from doing so unless there is such a memorandum signed by the defendant. There is, admittedly, no such memorandum unless the denial is proved to be false, but how can the falsity of the statement make that an admission which it would not be if the denial was true? It would be enabling the plaintiff to recover upon parol evidence, which the statute was passed to prevent.

The question is not whether the agency can be proved by parol, of which there can be no question, but whether

Judgment.
BURTON,
J.A.

the alleged bargain is evidenced by a memorandum in writing, signed by the defendant.

Assume, for a moment, that the transaction, instead of being through an agent, had been with the defendant personally, and the only acknowledgment of the contract had been in some such terms as this: "I have received an invoice of goods which you say I purchased of you, and have seen the goods, which are not what I want. I will not receive them, and would not do so even if I had ordered them, but I utterly deny having made any such bargain." Would it make this any more an admission because the denial was untrue and could be so proved?

It is said and truly that the statute has left the law of agency untouched, but it has not been said that a parol contract by an agent can be proved otherwise than by a memorandum in writing. When, therefore, the party to be charged signs a memorandum in which he alleges that the agent had no authority to purchase the goods mentioned in the invoice, how can that by any stretch of ingenuity be construed into an admission of a bargain which is enforceable against him?

Assume the agency proved to be as general as possible, so that there would be no difficulty whatever in fixing the defendant with liability at common law, we can never lose sight of the fact that the admission of the contract must be found within the four corners of the memorandum; that memorandum contains no admission of any contract—a reference to an invoice is not of itself an admission, coupled as it is with an assertion in the first place that the agent had no authority; and, further, that the goods shewn in it are not what the defendant wanted. To prove *aliunde* that the agent had authority to and did purchase these goods, is to prove the contract not by an admission of the defendant in writing, but the parol evidence at variance with the writing.

I venture to think that no case can be found to bear out such a contention.

Some misapprehension appears to my mind to exist in

reference to the passage cited from Blackburn on Sale, and the correction of it in a subsequent edition of the work.

Judgment.

BURTON,
J. A.

No one at all conversant with the clear and able writings of that eminent and very learned Judge, would for a moment attribute to him so illogical a conclusion as that a repudiation or denial of a contract could be an admission of it; or suppose that he ever intended to convey the meaning that an admission could be extracted from it, whether that denial was true or false.

The judgment in *Buxton v. Rust*, L. R. 7 Exch. 1, 279, so far from being in conflict with, appears fully to support the views which I have endeavoured to express, viz., that although there may be an intention to repudiate liability on the ground of some default on the part of the seller in carrying it out, still if there is an admission of the contract, the Statute of Frauds has been complied with; *aliter* if no such admission appears.

Willes, J., in giving the principal judgment in that case, uses this language: "The defendant says: 'I did enter into a contract with you on the 11th of January, but I will not perform it for a particular reason, and in order to shew that my construction of the contract is the correct one, I forward you a copy of its terms.' This is a sufficient admission, and the fact that it was accompanied by a repudiation of the obligation to perform the contract, does not prevent its being used as an admission." That is the distinction to be found in all these cases, and Lord Blackburn, who, as I have said, was a party to the decision, refers to the two cases in the Common Pleas, to which I have referred, as shewing what he meant when approving of the point decided in those cases; and again he refers to the contract as evidenced in the two letters of which the defendant wished to escape performance on the grounds mentioned.

Mr. Justice Lush, in the same case, says: "The defendant did not say: 'There is no contract,' but 'there is a contract, which I insist ought to be construed in a particular manner.'"

Judgment.

BURTON,
J.A.

Whether, therefore, the contract be made by the defendant or through an agent, it seems to me that unless it is admitted by the memorandum which he has signed, it still retains its character of an oral contract, which cannot be enforced by reason of there being no memorandum in writing signed by the defendant.

Such cases as *Taylor v. Smith*, [1893] 2 Q. B. 65, have no application to the case we are considering. I agree in the remarks made by some of the Judges in that case, that if the letters had referred to or incorporated the invoice, there would have probably been a sufficient memorandum. There, however, the case wanted, as Lord Justice Kay expresses it, the main element of *Long v. Millar*, 4 C. P. D. 450—the existence in a document signed by the defendant of words referring to a contract of purchase—the letters and the invoice together would have admitted a contract.

Here, then, is not only the want of such a document, but an express denial of any such contract which was binding upon the defendant, the party to be charged.

Much as I regret the conclusion I am compelled to hold that the defendant is not liable, unless we are prepared to repeal the Statute of Frauds.

The appeal should, in my opinion, be allowed, and my brother Street's judgment restored.

Appeal dismissed with costs,
BURTON, J.A., *dissenting.*

WEESE V. BANFIELD.

Bankruptcy and Insolvency—Composition Agreement—Resolution of Creditors—Fraud.

A resolution passed and signed by creditors at a meeting called to consider the debtor's position, that the debtor "be allowed a settlement at six, nine and twelve months, at the rate of twenty-five cents in the dollar in equal payments without interest" does not, in itself, operate as satisfaction of their claims. Payment in accordance with its terms is essential.

A creditor who assents to and signs the resolution, but before doing so makes a secret bargain with the debtor for payment of his claim in full is not debarred from suing the debtor for the original indebtedness upon default in payment of the composition according to the terms of the resolution, the debt not being in fact released or otherwise discharged; HAGARTY, C.J.O., dissenting on this point.

Per HAGARTY, C.J.O. :—The general doctrine as to "fraud on compositions" applies to a case of this kind, although there is no formal release under seal.

Judgment of the County Court of York reversed, HAGARTY, C.J.O., dissenting.

THIS was an appeal by the plaintiff from the judgment **Statement.** of the County Court of York.

The action was brought upon a promissory note for \$179.32, dated the 30th of October, 1888, payable on demand, made by the defendant W. H. Banfield, to the order of his wife, the defendant E. J. Banfield, and endorsed by her in favour of the plaintiff.

After the note was given, W. H. Banfield became financially embarrassed, and, under the circumstances stated below, effected a settlement with his creditors at the rate of twenty-five cents in the dollar of their claims; the plaintiff, however, by a secret agreement, stipulating for payment of his claim in full.

The action was tried at Toronto, on the 9th of April, 1895, before His Honour Judge McDougall, and was dismissed with costs, but there were no special findings or reasons for judgment.

At the trial evidence was given that at a meeting of the defendant's creditors, held on the 24th of February, 1890, a resolution was moved by the plaintiff and seconded by another creditor, in the following terms: "That Mr. Banfield

Statement. he allowed a settlement at six, nine and twelve months, at the rate of twenty-five cents in the dollar, in equal payments, without interest, provided that J. A. Banfield will consent to spend one or two hours per day to look after the financial management." This was signed by the plaintiff and other creditors, including J. A. Banfield. One of the creditors added to his signature the words "so far as unsecured."

The plaintiff's account of the matter was that the defendant asked him to move this resolution, which he consented to do on receiving the former's assurance that the security he then held from Mrs. Banfield by reason of her endorsement of the note in question and of a supposed guaranty by her of the debt bearing date a few months earlier would not be affected thereby, but that he made it a condition that the debtor himself should continue to be liable to pay in full, notwithstanding the composition. He also said that he received no new guaranty from the debtor's wife.

The defendant, on the other hand, said that at the meeting of the creditors the plaintiff took him outside and told him that if he would get Mrs. Banfield to see him paid in full he would fix it with the creditors that they would accept twenty-five cents in the dollar; he would help to get a settlement, and see that the creditors would give it; that the defendant agreed to this, and that his bookkeeper then, upon being instructed, went up at once to Mrs. Banfield and procured from her the guaranty required. The document, whatever it was, appears to have been drawn by the bookkeeper, and was not seen by the defendant. Mrs. Banfield said that on the day of the creditors' meeting the bookkeeper came to the house and read a paper, and told her that if she would sign that Mr. Weese would make the settlement with the creditors satisfactory. It was to the effect that if she would sign it Mr. Weese would help her husband through. She signed the paper: "it was so that I would secure Mr. Weese, would see him paid." The paper, whatever it was, was not produced,

and the bookkeeper was said to be dead. No witness in Statement.
terms proved that it had been given to the plaintiff. Some letters were produced written by one R. Tew, a collector to whom the plaintiff had handed the note sued on for collection, in one of which, addressed to the debtor, he said: "You appear to have overlooked the fact that Mrs. Banfield is held as endorser on your note independent of any arrangement you could have made with your creditors, and, further, on a guaranty from her of a more recent date, that your indebtedness will be paid in full." This letter was written in reply to a letter from the debtor apparently answering one which Tew had written to Mrs. Banfield, stating that he looked to her "as maker of the note on the strength of the guaranty given [by] Mr. Weese, and also the document at present in my possession to the effect that you would not mortgage or in any way pledge your property until the same was paid."

By this may have been meant the supposed guaranty set forth in the statement of claim, dated 5th September, 1888, addressed to Weese and signed by Mrs. Banfield, in these terms: "I promise you that I will not discharge the mortgage till I see you paid."

This was the only document in the nature of a guaranty produced at the trial, and Tew was not called to explain the allusion to the guaranty of more recent date, which was not produced.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 13th of September, 1895.

F. J. Roche, for the appellant. The vital point of distinction in this case is, that there was no release signed by the creditors. The mere resolution to accept the composition, unaccompanied by actual payment, worked no release, and the plaintiff is entitled to succeed. If the plaintiff cannot recover the full amount of the original indebtedness, he is at least entitled to the same proportionate amount as the other creditors.

Argument.

G. G. Mills, for the respondents. This is the ordinary case of fraud on a composition agreement, and the plaintiff must fail: *Mallalieu v. Hodgson*, 16 Q. B. 689; *Ex parte Oliver*, 4 DeG. & Sm. 354; *Ex parte Phillips*, 36 W. R. 567; Winslow's Law as to Private Arrangements with Creditors, p. 150. The plaintiff can sue neither for the original indebtedness nor for the composition payment: *McKewan v. Sanderson*, L. R. 15 Eq. 229; *Jackman v. Mitchell*, 13 Ves. 581; *Jackson v. Lomas*, 4 T. R. 166; *Clay v. Ray*, 17 C. B. N. S. 188; *Geere v. Mare*, 2 H. & C. 339; *Smith v. Cuff*, 6 M. & S. 160; *Watts v. Hyde*, 10 Jur. 127; *Good v. Cheeseman*, 2 B. & Ad. 328. The fact that the plaintiff was not paid or tendered twenty-five cents in the dollar, does not alter the binding effect of the resolution. The plaintiff demanded payment in full, and it would have been useless to go through the form of tendering less: "The Norway," 3 Moo. P. C. N. S. at p. 266.

F. J. Roche, in reply.

October 29th, 1895. OSLER, J. A. :—

[The learned Judge stated the facts as above set out and continued:]

It is unnecessary to consider the case as against the female defendant, as it is evident that there is no ground on which the plaintiff can recover against her. She was discharged as endorser, because she never had notice of dishonour, and probably for other reasons.

The substantial defence of W. H. Banfield is that, having called a meeting of his creditors to propose a compromise of their claims, the plaintiff refused to agree to the compromise and composition proposed unless the defendant would privately agree to procure a guaranty from his wife, the other defendant, to pay his debt in full. That the defendant agreed to procure, and did procure such guaranty; and that the plaintiff at the meeting of creditors, concealing from the other creditors that such guaranty had been procured by him, moved a resolution, which was

carried, that the defendant should be granted a compromise of his debts at the rate of twenty-five cents in the dollar, payable in six, nine and twelve months, by equal payments, without interest. That all the creditors except the plaintiff were afterwards settled with on these terms; that the plaintiff demanded payment of his claim in full, and that the defendant offered to pay him the composition, but that he refused to accept it.

Judgment.

OSLER,
J.A.

There is no evidence that the debtor or any one on his behalf tendered payment of the composition in accordance with the terms of the resolution, or that the plaintiff, during the time when it was payable, dispensed with a tender of such payment or refused to accept it. But it does appear that at a later date, viz., in June or July, 1893, when Tew (the collector) was demanding payment of the note, some offer of payment in full of the composition was made on behalf of the debtor by a person to whom he had sold out his business and who had paid the other creditors.

It was argued that in the light of Tew's letters and of the evidence of the debtor and his wife the secret agreement for a guaranty by the latter for payment in full was proved, which was a fraud upon the other creditors, and disentitled the plaintiff to sue either upon the original debt or for the composition.

The question is whether, assuming that some such agreement in fraud of creditors as was pleaded was proved, the plaintiff can recover in respect of his original cause of action, default having been made by the debtor in payment of the composition.

If the composition had been by deed containing a release of all claims by the creditors in consideration of the composition, with a stipulation that the claims should revive or the deed become void on default in payment of the composition, the authorities are clear not only that the release in such case is absolute, and that the debt is not revived in default, but that the creditor who is party to the fraud, whether it consist in a stipulation for a larger payment or for security for the balance of his claim, cannot recover

Judgment.

OSLER,
J.A.

even the amount of the composition: *Howden v. Haigh*, 11 A. & E. 1033; *Mallalieu v. Hodgson*, 16 Q. B. 689, 711; *Higgins v. Pitt*, 4 Exch. 312, 322.

The effect of the transaction, as Lord Halsbury says in *Ex parte Phillips*, 36 W. R. 567, is this: "I release the debt you owe me provided you pay me that which will be a larger proportion of what you ought to pay than any other creditor will get. Such a condition is tainted with illegality, and it can make no difference that, instead of being expressed in the deed, it was come to by a secret arrangement. The result is that *the release remains absolute*, and the condition, which creates a fraudulent preference, is void."

The decision of the Commissioner in Bankruptcy, in *In re Cross*, 4 DeG. & S. 363 (n), is approved. There, a creditor executed a composition deed dated 15th June, whereby it was expressed that in consideration of bills to the amount of ten shillings in the pound on the amount of their claim, to be drawn and accepted by certain persons, being handed over to the creditors signing it on or before the 22nd June, the creditors discharged the debtor of all their demands upon him, provided that if the bills were not handed over on the 22nd, and subsequently paid, the debts should revive. The creditor in question had secretly agreed with the debtor that he should, in addition to the composition, have bills for the other ten shillings of his debt, payable at distant dates. The bills for the composition were not delivered on the 22nd June, and the creditor soon after sued out a fiat in bankruptcy against the debtor for his whole demand, contending that though the composition deed and the release therein were operative between the 15th of June and the 22nd, yet the default in delivery of the composition bills on the 22nd caused the original debt pursuant to the proviso to revive. The Commissioner in Bankruptcy was of opinion that the debt did not revive: "It is a universal rule that a fraudulent deed, though operative against the fraudulent party to it, is not operative for him, and therefore confers on

him no rights whatever; and hence, though the deed of the 15th of June operated so as to bar Gibbons's claim for £1,600, it did not operate to give him any right to receive the £800; and if so, Cross's not giving the bills for the £800 on the 22nd of June was immaterial. * *

If (persons guilty of such frauds), on being detected, might still rely on the right they openly stipulated for, they would, in case of non-detection, obtain a great gain, and in case of detection suffer no loss, which would be of evil example. If they could go still further—if, alleging that the debtor was *particeps criminis*, and on that ground insisting that the deed should not operate in his favour, they could fall back on their original demand, the result would be more pernicious still, for it would be to injure all the other creditors, and to make the delinquent's fraud a source of pecuniary advantage to him. In my opinion, Gibbons, in endeavouring to overreach the other creditors, has only overreached himself, for he has ceased to be a creditor of the bankrupt for any sum whatever—he is not a creditor for the £1,600, *for he has released that demand*—nor is he for the £800, because no right accrues under a fraudulent deed in favour of the fraudulent concoctor." See also *Alsager v. Spalding*, 4 Bing. N. C. 407; *Higgins v. Pitt*, 4 Exch. 312.

Jndgment.

OSLER,
J.A.

The case at bar differs from the cases cited, and, so far as I am aware, from any which has yet been decided, in this, that here there is no release, nor anything but a mere agreement in writing assented to by the debtor in the shape of the resolution signed by the creditors to accept a composition on their debts payable in six, nine and twelve months from its date.

If the creditors choose to accept the promise of the debtor merely, and not its performance, in satisfaction of their claims, they may no doubt do so, the agreement of the whole to accept a composition on their debts being a good consideration for the giving up by each of his claim to the remainder. That was the case of *Good v. Cheeseman*, 2 B. & Ad. 328.

Judgment.

OSLER,
J.A.

It is a question of the construction of their agreement with the debtor, but it is not easily or readily to be inferred from the bare proposition of the debtor assented to by his creditors to pay a composition that they have accepted the promise, and not its performance in satisfaction: *Edwards v. Hancher*, 1 C. P. D. 111; *Edwards v. Coombe*, L. R. 7 C. P. 519, 522.

And that is not the present case. Composition, it has been said, implies payment, and had the debtor paid the composition in accordance with the terms of the resolution, he could no doubt have pleaded the whole as a satisfaction and discharge. "Composition," says James, L. J., in *In re Hatton*, L. R. 7 Ch. 723, "must be paid pursuant to the agreement as well as agreed to be paid to give the debtor a valid defence to an action at law;" and *per Mellish*, L. J.: "At common law, where a body of creditors accept a composition, they may either agree to take the promises of the debtor, with or without a surety, in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place the creditors will accept that composition in satisfaction of their debts. * * But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him."

Then, where default has been made in payment of the composition, where the accord and satisfaction is not absolute by the mere agreement for composition, but conditioned upon payment, upon what can the debtor rely as a defence to the action upon the original liability? While the agreement was executory it was no doubt a bar to an action until default, because there was an implied agreement to forbear from suing, which the debtor was entitled to rely upon and to plead during the pendency of the composition: *Ford v. Beech*, 11 Q. B. 852; *Beech v. Ford*, 7 Hare 208; *Slater v. Jones*, L. R. 8 Exch. 186;

Newell v. VanPraagh, L. R. 9 C. P. 96; *Newington v. Levy*, L. R. 6 C. P. 180.

Judgment.

OSLER,
J.A.

Of such a defence the creditor's fraud would be no ingredient. It would, however, be quite different from a defence founded upon an absolute release contained in a deed of composition, which the debtor might plead either before or after the time fixed for payment of the composition. If pleaded to action brought after that time it would devolve upon the creditor to shew that by some condition subsequent in the deed, *e.g.*, by default in payment of the composition, the release had been avoided, and the original cause of action revived, and this he could not do, as shewn by *Ex parte Oliver*, 4 DeG. & Sm. 354, and the other cases cited, where the whole agreement, consisting of the composition deed, the release, and the secret stipulation in his favour were tainted by fraud. But default in payment of the composition, where the bar to the creditor's action arises merely from the implied agreement for forbearance or promise not to sue during the pendency of the composition, terminates only that implied obligation, and leaves the debtor without any defence to the action for the original claim. There remains nothing for the creditor to avoid as in the case of the release; nor is there in that case anything which the debtor can any longer plead as a defence.

Tested by the pleading it seems clear that there can be no defence unless indeed the plaintiff is estopped from saying that the composition was not paid. I am not aware of any authority for that.

It seems perhaps necessary to repeat that the case in my opinion resolves itself into this: that the defendant made default in payment of the composition, a default not excused by any refusal or neglect on the plaintiff's part, and that there is nothing on which he can rely as a discharge or release of the original debt.

I am of opinion that the appeal should be allowed.

Judgment. MACLENNAN, J. A.:—

MACLENNAN,
J. A.

This appeal is in form and substance against both defendants. Mr. Roche, however, did not press it against the wife, but, indeed, said he did not intend to appeal against her. The appeal must, therefore, be dismissed as against the wife.

As regards the husband, the action is on a promissory note which is not disputed. The defence is, that there was an agreement between the plaintiff and the defendant and the other creditors of the defendant for a composition payable in six, nine, and twelve months, of twenty-five cents in the dollar; but that there was a secret agreement between the plaintiff and the defendant that the plaintiff's debt should, nevertheless, be paid in full, and that the defendant's wife would give a guarantee that it would so be paid. I think it is proved that some such secret agreement was made, and that at the request of the defendant his wife signed, and the plaintiff accepted and received, some paper in the nature of a guarantee for the whole debt. This guarantee or paper is not produced by the plaintiff, although there is evidence that it was in the possession of Tew, his agent, some time after the agreement with the creditors, for the purpose of being enforced against the wife. The defendant contends that under the circumstances the plaintiff cannot recover either his debt or the composition; that the original debt was released by the agreement for composition, and that the agreement for composition being tainted with fraud, cannot be enforced. The case of *Ex parte Phillips*, a decision of the Court of Appeal, reported in 36 W. R. 567, is cited as establishing that in such a case, if by the composition agreement the debt is released, the creditor is wholly without remedy; he is bound by the release, but cannot recover the composition under it by reason of the fraud. In that case there was a deed of composition between the debtor and his creditors, expressly releasing the debtor; and a secret stipulation for a payment to the

plaintiff in excess of the other creditors; and it was held that the release remained absolute; but that the condition being fraudulent and made with the intention of deceiving the other creditors, was void. Judgment.
MACLENNAN,
J.A.

Lord Chancellor Halsbury cited Sheppard's Touchstone, p. 132: "If the condition be subsequent to the estate, the condition only is void and the estate good and absolute." And Lord Esher, M. R., expressed his concurrence with what was said in *In re Cross*, reported in a note to *Ex parte Oliver*, 4 DeG. & Sm. at p. 363: "It is a universal rule that a fraudulent deed, though operative against the fraudulent party to it, is not operative for him, and therefore confers on him no rights whatever."

The question, therefore, in this case, in my opinion, is whether the resolution of the creditors, to which the plaintiff was a party, had the effect of releasing the debt. The action is on a promissory note still in possession of the plaintiff, and unless it has been released by the resolution, the plaintiff is entitled to recover. What is said, is that the defendant's agreement to pay twenty-five cents in the dollar in six, nine, and twelve months, was accepted in satisfaction of the note. The resolution is short, and is in these terms: "That Mr. Banfield be allowed a settlement at six, nine, and twelve months, at the rate of twenty-five cents in the dollar, in equal payments, without interest, provided that J. A. Banfield will consent to spend one or two hours per day to look after the financial management." It was reduced to writing, and was signed by the creditors and by J. A. Banfield, but not by the debtor.

In a case under the arrangement clauses of the English Bankruptcy Act (*In re Hatton*, L. R. 7 Ch. 723), and which is not for that reason a governing authority for the present case, the language of the resolution was stronger in favour of a present discharge than the words used here, namely, that a composition of five shillings in the pound, payable on certain named days, should be accepted in satisfaction of the debts. In that case, Mellish, L. J., said: [The learned Judge read the passage already cited and con-

Judgment. continued:] The decision in this case has been a good deal discussed in some subsequent cases, but in none of them has this statement of the rule at common law, and irrespective of the Bankruptcy Act, been questioned. As stated by Mr. Justice Mellish, it is here simply a question of the construction of the resolution; and to my mind it is clear that it does not mean that the promise of the debtor to pay the composition *ipso facto* released the debt; and that it means no more than that upon the composition instalments being all paid, that would operate as a settlement and satisfaction. The payments were admittedly not made or tendered, although it is loosely stated that they would have been made if the plaintiff had been willing to accept; and so there never was any release or discharge of the debt sued upon. The sole question then which remains is, what, if any effect, the fraud to which both the plaintiff and defendant were parties, has upon the plaintiff's claim. The plaintiff sues upon a note, which was an honest note, and the defendant has to set up the fraudulent agreement. The defence is a confession and avoidance; he seeks to avoid the honest claim by setting up the fraudulent agreement to which he was a party; but in the language of Lord Esher: "Though operative against him, it is not operative for him."

It is said that such a result is unfair to the other creditors who accepted their composition, but that is not so. They were deceived by the secret bargain made by the debtor, and are, therefore, not bound by the composition, and could recover their debts in full if they chose to exact them.

There is a passage in Chitty on Contracts, 12th ed., p. 775, which might be taken to mean that an agreement for a composition between a debtor and several of his creditors *ipso facto* operated as a discharge of the original debts, irrespective of payment of the composition; but the cases cited as authority, do not warrant the statement in that broad sense. They merely shew that such agreements are valid, and if carried out by the debtor will extinguish the original debts.

For these reasons, I think that the plaintiff's note was not extinguished, and that he is entitled to judgment thereon; and that the appeal should be allowed as against the defendant the husband.

Judgment.
MACLENNAN,
J.A.

HAGARTY, C. J. O. :—

I think it was proved at the trial that there was an agreement entered into between the plaintiff and the defendant by which a legal fraud was committed on the body of the creditors who joined the plaintiff creditor in an agreement to accept twenty-five cents in the dollar on their claims against the defendant. The plaintiff's claim was evidenced by a note for \$179.32 made by the defendant and endorsed by his wife. His counsel had to admit at the trial that no claim could be enforced against the wife, who had no separate estate and had not been notified as endorser. She had previously signed, about a month before the note, a document which the plaintiff called a guaranty, but was rightly held not to be one. So that all the plaintiff's claim was on the note. By the agreement signed by the plaintiff and all the creditors, I think it clear that for any existing claim he lost all right to three-quarters of the note. He made no reservation and gave no intimation to his fellow creditors that he had any further claim on the debt represented by the note. It would be an undoubted commercial fraud on them to allow him to claim his whole debt after joining with them in a general arrangement binding all who signed to give up three-quarters of their respective claims. All, except the plaintiff, received and accepted the composition. This, I think, barred their claims for any further payment. The acceptance of a smaller amount on a composition has been held to be not within the *Cumber v. Wane*, 1 Sm. L. C. 9th ed., p. 357, doctrine, and our Ontario Act is clear on the subject: Judicature Act, R. S. O. ch. 44, sec. 53 (7).

It is not necessary to go through the numerous cases on this point. It may suffice to refer to the 13th chapter of

Judgment. Winslow's Law of Private Arrangements with Creditors, where they are fully discussed.
HAGARTY,
C.J.O.

On this branch of the case, it does not seem to matter as to the form of the instrument executed by the creditor. Its meaning is clear, and it was fully acted on by the payment to them of the sums stipulated for as amounting to the twenty-five cents.

I think the evidence shews that the plaintiff could at any time have received the composition, had he not persistently refused and insisted on payment in full. I think it proved that he could get this amount if he would accept it.

Mr. Roche pressed us with the argument that his client could at least recover the amount of the composition. I think not. Generally the cases shew that there may be a deed of composition making the non-payment of the composition as agreed an avoidance of the settlement.

In *Ex parte Phillips*, 36 W. R. 567, in 1888, before Lord Chancellor Halsbury, Lord Esher, and Bowen, L. J., there was a deed of composition releasing all debts; but providing that if the debtor made default in paying the composition, the deed should become void, and that the creditors should not to be bound by its provisions. There was a secret arrangement by which Phillips was to receive a payment in excess of the other creditors. The debtor paid part of this to Phillips, but failed to pay anything under the composition. The question came up on Phillips's application for a bankruptcy petition.

His counsel cited *Ex parte Oliver*, 4 DeG. & Sm. 354, and the trial at law ordered there of *Mallalieu v. Hodgson*, 16 Q. B. 689. The Lord Chancellor said: "I am not disposed to quarrel with the decision arrived at in 1851 (*Ex parte Oliver*), and since acted on, that where there is an agreement by a creditor to release his debt subject to conditions, and there is at the same time a secret understanding which is a fraud on the other creditors, such agreement to release is binding, even though the conditions are not performed. It is clear that that decision rests on a sound basis of law."

Lord Esher says: "This deed is not void, the release remains absolute. But the condition, being a fraudulent condition made with the intention of deceiving all the other creditors, is void, and the fraudulent party has lost both his original debt and the composition."

Judgment.
HAGARTY,
C.J.O.

Again he cites with approval: "It is a universal rule that a fraudulent deed though operative against the fraudulent party to it, is not operative for him, and therefore confers on him no rights whatever."

In the appeal before us we have no deed, no formal release, or clause avoiding settlement on nonpayment. But I think the principle is the same, and the omission to pay the composition cannot condone the original fraud or forfeit the substantial relief to the debtor of the three-quarters of each claim.

On the evidence we may treat the plaintiff as of his own wrong refusing to do as all the others did, viz., receiving the composition as in full of their claims.

It would be an encouragement to creditors who deal unfairly with their fellow creditors if they are allowed to sue for the whole original claim, and if defeated in such unjust demand, to then recover payment under the composition agreement which they had tried to destroy, and which it was wholly their own wrong to refuse.

Appeal allowed with costs,
HAGARTY, C. J. O., *dissenting.*

HAIST V. GRAND TRUNK RAILWAY COMPANY OF CANADA.

Accord and Satisfaction—Damages—Negligence—Separate Trial of Issue.

Payment to a person injured by an accident on a railway of the sum of ten dollars, and a receipt signed by him for "the sum of ten dollars, such sum being in lieu of all claims I might have against said company on account of an injury received on the 6th day of May, 1893," may constitute accord and satisfaction.

An issue as to the effect of the payment and receipt and its procurement by fraud, may be tried by the Judge presiding at the trial of an action to recover damages for the alleged injury, and need not necessarily be left to the jury.

Judgment of the Queen's Bench Division, 26 O. R. 19, reversed.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 26 O. R. 19.

The action was brought to recover damages for injuries alleged to have been sustained by the plaintiff owing to the negligence of the defendants, who, besides setting up a defence on the merits, relied on an alleged settlement before action. The facts are fully stated in the report in the Court below.

The appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 25th of September, 1895.

McCarthy, Q.C., for the appellants.

Aylesworth, Q.C., for the respondent.

October 29th, 1895. The judgment of the Court was delivered by

HAGARTY, C.J.O. :—

On the argument it was urged for the plaintiff that the plea did not shew accord and satisfaction and could not be treated as such.

Technically we may think that there should have been a distinct averment that the plaintiff took and received the money "in full satisfaction and discharge of the grievances complained of."

I think in the present state of the law of pleading we cannot give way to such an objection, and we must take it as sufficiently amounting to the old plea of accord and satisfaction.

Judgment.

HAGARTY,
C.J.O.

In *Rideal v. Great Western R. W. Co.*, 1 F. & F. 706, the company pleaded accord and satisfaction, on which issue was taken, and the following receipt was produced :—

“Received of the Great Western Railway Company the sum of £20 in full satisfaction of the injuries arising from the accident of the 31st ult., and all consequences arising therefrom.”

Erle, C. J., left it to the jury to say whether the plaintiff's mind went with the terms of the paper which he signed, and said that if he was aware of its effect he would be bound by it ; that no improper practice had been pursued, and that it did not appear that the company's servants took any unfair advantage of the plaintiff. The jury on this found for the defendants.

I think the learned trial Judge rightly found for the defendants on this issue, and that the plaintiff's replication of fraud and undue influence was not supported by proof.

Nor do I think that there is anything in the plaintiff's criticism of the wording of the receipt, or of his signing it declaring he had no claim against the company, or that he was alone to blame. In substance there is clear averment of both an accord and of satisfaction by the payment and receipt of the money for the injuries claimed in the action.

In *Lee v. Lancashire and Yorkshire R. W. Co.*, L. R. 6 Ch. 527, a receipt in substantially the same form as this was treated as a good accord and satisfaction unimpeachable on ground of fraud, etc., etc.

I find great difficulty in holding that the learned trial Judge had not the right in his discretion to leave some of the issues to the jury, and to try the other or others himself.

Consol. Rule 655 empowers the Judge to order that dif-

Judgment.

HAGARTY,
C.J.O.

ferent questions of fact be tried by different modes, or that one or more questions of fact be tried before the others.

Consol. Rules 677 and 678 may also be referred to.

This Rule 655, except the reference to the Judicature Act, seems to be worded exactly as the English Rule of 1875, Order 31, Rule 6, which is noticed by Jessel, M. R., in *Emma Silver Mining Co. v. Grant*, 11 Ch. D. at p. 926. He there says: "One judge has no right to embarrass other judges by laying down general rules of construction, and it is very undesirable to limit the operation of a rule expressed in general terms by stating the circumstances, or all the circumstances, under which the judge thinks the discretion ought to be exercised. The discretion is general. Of course it is a judicial discretion, and there must be sufficient reasons for exercising it."

Here the learned Judge, after argument, decided to try the issues of negligence, etc., first. A nonsuit having been refused the defendants went into their defence as to alleged negligence, and then as to obtaining the receipt. He declined to leave the whole case to the jury, saying he would follow *Johnson v. Grand Trunk R. W. Co.*, 25 O. R. 64; 21 A. R. 408, decided by Armour, C.J., who decided to try the release defence himself, leaving the negligence question to the jury.

Reserving the trial of the receipt issue for his own disposal, the case was left to the jury, but the receipt was referred to as shewing the admission by the plaintiff that the injury occurred from his own fault, etc.

The jury found for the plaintiff; the learned Judge then considered all the evidence and found the issue of accord and satisfaction in favour of defendants.

In *Johnson v. Grand Trunk R. W. Co.*, issues like the present were tried separately as here. Neither in the Divisional Court nor in this Court, was there serious dispute (although noticed) as to the right of the trial Judge to take this course.

It was also urged that as all the evidence in both issues was in, the jury in finding for the plaintiff generally must be considered to negative the alleged accord.

But the learned Judge kept the issues distinct, although on the issue as to negligence he referred to the receipt as shewing the plaintiff's own account of the injury as happening by his own fault and carelessness. It was not left to them in any way to decide whether the replication displaced the plea of accord and satisfaction.

Judgment.
HAGARTY,
C.J.O.

As already said, I see nothing to shew that the learned Judge had not the right to settle the mode of trial as he did, and as Armour, C. J., did in *Johnson's* case, and as to which this Court declined to interfere as to his exercise of discretion. I do not think it can be successfully attacked.

I can see no ground, in the interests of justice, why we should question the propriety of the course taken.

If we could see that the Judge took that course under a mistaken view of the law, it would bring the case within the principles laid down in *In re Martin, Hunt v. Chambers*, 20 Ch. D. 368, that the Judge "having the discretion, there must be a plain and clear case to justify the Court of Appeal in interfering, for, as a general rule, the Court does not interfere with the exercise of the discretion of the judge. There must be some special reason to induce it to do so."

The mere right of interference is undoubted, but it is duly qualified by the considerations fully noticed in this case by Jessel, M.R., Cotton, and Lindley, L.JJ.

The Judge below had made the order complained of under a misconception of the law and as to the onus of proof. See also such cases as *Gardner v. Jay*, 29 Ch. D. 50; *Ruston v. Tobin*, 10 Ch. D. 558.

The Appellate Court will interfere to prevent injustice.

I see no injustice whatever resulting from the course taken by the learned Judge.

There were two clearly distinct issues. He tried one and held against the plaintiff on very clear evidence.

With much respect for the opinion of the Queen's Bench Division, I think we should allow the appeal.

Appeal allowed with costs.

MCNAB V. CORPORATION OF THE TOWNSHIP OF DYSART
ET AL.

*Municipal Corporations—Nuisance—By-law—Road Allowance—R. S. O.
ch. 184, secs. 551, 552.*

Where a mill, erected with the permission of the township council, partly on an unused road allowance in the occupation of the Midland Railway Company, in lieu of which they had given another piece of land for a road, was afterwards pulled down by the orders of the council on the ground that the terms upon which its erection had been consented to had not been complied with, no by-law for its removal being passed, the owner was held entitled to damages. The pulling down of the building would, under the circumstances, if justifiable at all, be so only if authorized by by-law.

Judgment of the Chancery Division affirmed.

Statement. THIS was an appeal by the defendants from the judgment of the Chancery Division.

The action was brought to recover damages for the destruction of the plaintiff's mill by the defendant Prust, acting under the orders of his co-defendants, the corporation. The mill in question stood in part upon an original road allowance, along the shore of Head Lake, in the township of Dysart, and several years before it was built, an arrangement had been come to between the corporation and one Stewart, the owner of the adjacent land, and the Midland Railway Company, that the railway company should place its line next to the lake shore, with a fairly straight course; and that the highway, instead of running along the sinuosities of the shore according to the original reservation, should be opened to the south of the railway, and should also be made reasonably straight. For the purpose of carrying out this arrangement, the railway company acquired from Stewart the land which was necessary, and the railway and highway were then laid out and constructed in this manner, and were afterwards so occupied and used. It was part of the arrangement that the railway company should construct and maintain a fence between the highway and the railway, and that also was done. At the point where the plaintiff built his mill, both the highway and the railway company's rails were wholly

outside of the original allowance, and upon land acquired from Stewart as above mentioned. From the time of the making of this arrangement, the railway company deemed themselves the owners of the land between the highway and the water, which included the whole of the original allowance at the point in question in this action; and by a lease made in October, 1882, they assumed to demise it up to within fifteen feet of the centre of their line to one Irwin for twenty-one years. Irwin entered under his lease and occupied the land thus demised, and operated for some years a saw mill which he built thereon. The plaintiff claimed under Irwin, but for greater precaution, he also obtained the consent of the defendants to his occupation. Statement.

This consent was given by a resolution of the council, and was subject to the condition that the mill should be completed within a time limited. The condition was not complied with, and after the time fixed for completion and when the mill was nearly completed, the council passed another resolution rescinding the consent and ordering the removal of the mill, which was then pulled down by the defendant Prust, their clerk.

The action was tried at Lindsay, on the 28th of March, 1894, before ARMOUR, C. J., who gave judgment in the plaintiff's favour for \$200 and costs, and this judgment was, by a division of opinion, affirmed by the Chancery Division, ROBERTSON, J., agreeing with the judgment at the trial, and MEREDITH, J., taking the opposite view.

The defendants then, pursuant to leave, appealed to this Court, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 1st of October, 1895.

Watson, Q. C., for the appellants. There is nothing in the Municipal Act making it necessary to pass a by-law in such a case as this. *Waterous v. Palmerston*, 19 A. R. 47; 21 S. C. R. 556, is relied on, but that case dealt with a

Argument. matter as to which a by-law is expressly required. The road was vested in the municipality : R. S. O. ch. 184, sec. 527, and they were bound to keep it in repair : section 531, and the act complained of was properly done in discharging this obligation, and no by-law was necessary : *Pratt v. Stratford*, 16 A. R. 5. The building was an obstruction and a legal nuisance : Garrett's Law of Nuisances, p. 314 ; Wood's Law of Nuisances, 2nd ed., secs. 738, 740.

W. Steers, for the respondent. No provision was made in the resolution for the consequences of default, and there was no power to take this summary way of bringing the plaintiff's rights to an end. The consent of the municipality was not necessary. There had been a substitution of a new road for the original road allowance, and the old road was not vested in the municipality. The rails were still on this land, and the plaintiff was there with the railway company's permission, and this land could not be used as a highway : *Croft v. Peterborough*, 5 C. P. 141 ; *Nevill v. Ross*, 22 C. P. 487. At any rate if it remained a road, the municipality could not eject : R. S. O. ch. 184, secs. 525, 527 ; Harrison's Municipal Manual, 5th ed., p. 480. It is not pretended that they entered for the purpose of opening an unused road allowance, for a by-law would then be necessary, and it cannot be said that this building was a nuisance : *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 714. But even if it were a nuisance, there was no right to destroy it : Dillon's Municipal Corporations, 3rd ed., sec. 374 ; and the defendants were trespassers *ab initio* : *Parkdale v. West*, 12 App. Cas. 602 ; *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93.

Watson, Q. C., in reply.

October 29th, 1895. HAGARTY, C. J. O. :—

One of the plaintiff's objections in this case is, that the pulling down or removal of the mill as admitted in the defence, pleaded to have been done by the defendants' order and authority, was not lawful in the absence of any by-law passed for that purpose.

The plaintiff had, by resolution of the council, erected his mill partly on what they call the original allowance for road, partly on land of which he was tenant. He did not so complete in time as the defendants say he promised, and after notice to him, the defendants pulled down his frame building, both the part which was said to be on the road and the part on his land, alleging that to remove the first part they necessarily pulled down the second part.

Judgment.
HAGARTY,
C.J.O.

The evidence shewed that the small portion of the old allowance encroached on by the plaintiff under the defendants' leave, was not really used as the public road, and was useless as such. A railway located its line on a part of the allowance, and in lieu thereof provided a strip of land adjoining, and on this the public road was run, and public money expended thereon ; so that in fact the piece on which the plaintiff encroached became unused and useless for general travel.

I do not think that, at all events without the formal authority of a by-law, the defendants could lawfully take the course they adopted.

There was no existing nuisance to a public road causing obstruction to any one ; no nuisance "*ad commune nocumentum*," calling for any interference.

It is clear, on the evidence, that there was no public need of interference, but this was simply a method of getting rid of a troublesome licensee for non-fulfilment of contract.

I cannot bring the proceeding within any of the many cases in which a municipality is called on to act for public safety or protection as to the user of public highways, or in any way as done in fulfilment of any duty cast on them by the Legislature or by the common law.

The corporation could not do an illegal act by passing a by-law directing its performance. But conceding, for the argument, that the act was not necessarily illegal, we may consider that it was of such a nature, dealing with a person who acted by their license, that there ought to have been a formal expression of their deliberate action in the shape of a by-law.

Judgment.

**HAGANBY,
C.J.O.**

I do not think that the case falls within the principle of *Pratt v. Stratford*, 16 A. R. 5, in this Court, or within such an authority as *Croft v. Peterborough*, 5 C. P. 141.

Between the small erection of this plaintiff and a costly building, encroaching a few feet on an admittedly public highway, it is only a question of degree.

I agree on the whole with the learned trial Judge that a by-law was necessary under the very peculiar circumstances of this case.

The corporation, in its pleading, admits and justifies the grievances alleged, and cannot urge non-liability for acts done without the sanction of a by-law: see *Nevill v. Ross*, 22 C. P. 487, and the language there cited of Macaulay, C. J., in *Croft v. Peterborough*, 5 C. P. 141; also *Lewis v. Toronto*, 39 U. C. R. 343.

Even if mistaken as to the necessity of a by-law, I still think the defendants were trespassers in fact on property of the plaintiff. The small piece of ground on which he was formally allowed to extend his building, had substantially ceased to have the character of a highway, another piece of land having been formally taken therefor and public money expended thereon; a legal license of user had been given to the plaintiff, and all formal arrangements had been made for the exchange as to the old and new road with the railway company. No time was fixed for completion by the plaintiff in the resolution. Time was only a matter of talk with some of the councillors. It was not an entry for condition broken.

In support of the view that the old piece of road was abandoned and disused, we find that the defendants on the same day that they gave the place to their clerk (the defendant Prust), passed a by-law to formally close the piece in question.

BURTON, J. A. :—

I think that the municipal council had no right to have the building removed, and I, therefore, agree in dismissing the appeal.

OSLER, J. A. :—

Judgment.

OSLER,
J.A.

The plaintiff's mill was built, in part, upon land leased by him from the owner and in part upon what was at one time an original allowance for road. But this original allowance for road had, for many years, been fenced in by the Midland Railway Company, whose line was carried along it, and it was not used by the public or opened for travel as a public highway. This had been done with the assent of the township council, and the railway company had, with their assent, procured and dedicated another piece of land as a road in lieu of that part of the original allowance so fenced in and taken for the purposes of the railway. This substituted road had been opened for travel as a public highway, and accepted and repaired as such by the defendants. The railway company were in possession of that portion of the original allowance for road on which a part of the plaintiff's mill extended, and if they were lawfully in possession, it was they only who could complain of the plaintiff's intrusion or interfere with his building. The case seems to be somewhat analogous to the cases provided for by section 551 of the Municipal Act, R. S. O. ch. 184, though that section is, by its precise terms, limited to the case of an owner of land adjoining the original road allowance, who has voluntarily opened a road, or through whose land a road has been expropriated, leaving him still the owner of lands next adjoining the original allowance. What has happened here is that the railway company has purchased lands for a new road adjoining the original allowance which the township has accepted and adopted as a road in lieu of the allowance, leaving the former in possession of the allowance; in effect, exchanging the one for the other. In strictness, I doubt if the Act covers that case, so that the decisions *In re Beemer and Grimsby*, 13 A. R. 225; *In re Webster and West Flamborough*, 35 U. C. R. 590, and *Burritt v. Marlborough*, 29 U. C. R. 119, may not apply. Nevertheless, the township and the company having been parties to such a transaction,

Judgment.

OSLER,
J.A.

I think the former could not undo it and assert their rights in the road allowance, treat it as an open and travelled road and all erections that might be built in or placed thereon as nuisances which they might abate in a summary manner, as they have done here.

It could hardly be argued that while the allowance remained in the possession of the railway company it could, as against the township, be regarded as an open and public highway for which the township would be liable to any one using it for injuries arising from non-repair. That being so, I am of opinion that before they could assert a right to remove any building thereon, as being a nuisance, it would be necessary for them first to pass a by-law to open the road, assuming that, under the circumstances, having regard to what has taken place, they could lawfully pass such a by-law.

On this ground, I think the appeal should be dismissed, and I am not sorry to be able to come to that conclusion, because it is evident that the action of the township was not only high handed and unjust, but that it was prompted by a desire to benefit one of their own officials rather than to assert the rights of the public.

I do not wish to be understood as assenting at present to the view that a plain nuisance existing in an open and travelled public highway may not be abated in the exercise of the ordinary powers of the council in respect of roads without first going through the form of passing a by-law for that purpose. This I think was recently held by us in the case of *The City of London v. The London Street Railway Company*.

MACLENNAN, J. A.—[after stating the facts as above set out]:—

In my opinion it was not necessary for the plaintiff to obtain the consent of the defendants, for they had no longer any title. *Burritt v. Marlborough*, 29 U. C. 119; *In re Webster and West Flamborough*, 35 U. C. R. 590, and *In re Beemer and Grimsby*, 8 O. R. 98, and 13 A. R. 225, shew that under the circumstances of this case, the township

having given the old allowance in lieu of a new allowance procured for them by the railway company, could claim no title in the old allowance by reason of the provisions of sections 551 and 552 of the Municipal Act, R. S. O. ch. 184.

Judgment.
 MACLENNAN,
 J.A.

Under these circumstances the defendants had no right to pull down the plaintiff's buildings, and their appeal must be dismissed.

Appeal dismissed with costs.

THE CANADA PERMANENT LOAN AND SAVINGS COMPANY
 V. TODD.

Bills of Sale and Chattel Mortgages—Affidavit of Bona Fides—Designation of Commissioner—Solicitor's Power to take Affidavit—Growing Crops—Currency of Mortgage.

An affidavit of *bona fides* in a chattel mortgage sworn before a person who is in fact a Commissioner authorized to take affidavits in and for the High Court, but who places after his signature in the jurat only the words "A Comr. etc.," is good.

Such an affidavit may be made before a solicitor employed in the office of the mortgagees' solicitors.

Crops to be grown may be covered by a chattel mortgage and a chattel mortgage of "crops which may be sown during the currency of this mortgage" covers crops sown after the mortgage falls due but remains unpaid; OSLER, J.A., dissenting on this point.

Judgment of the County Court of York affirmed.

THIS was an appeal by the defendant from the judgment of the County Court of York. Statement.

The plaintiffs were mortgagees of a farm, the owners of which, on the 27th of January, 1893, gave to them a chattel mortgage as collateral security for the payment of arrears of principal and interest. The proviso for payment in this chattel mortgage was as follows:—

"Provided always, and these presents are upon the express condition that if the mortgagors, their executors or administrators, do and shall well and truly pay, or cause to be paid, unto the mortgagees, their successors or

Statement. assigns, the full sum of \$752.16 on or before the 1st day of November, 1893, together with interest thereon from the 1st of January, 1893, at the rate of six and a half per cent. per annum, then these presents, and every matter and thing herein contained, shall cease, determine, and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in anywise notwithstanding."

The chattel mortgage covered specifically described farm stock and chattels "and thirty-seven acres of fall wheat; also the crops to be derived from the seed of every description now sown or which may be sown during the currency of this mortgage upon the lands within mentioned, the intention being that this mortgage shall attach upon the crops in their various stages of growth until and after the maturity thereof."

The lands were then described and were the lands covered by the real estate mortgage.

The defendant was an execution creditor of the mortgagors, and in September, 1894, both mortgages being unpaid and in arrear, the sheriff, under the execution, seized on the mortgaged lands 200 bushels of wheat, 100 bushels of barley, 100 bushels of oats, and eight tons of hay.

The plaintiffs claimed all this grain and hay and an interpleader issue was directed which was tried at Toronto on the 15th and 17th of December, 1894, before His Honour Judge Morgan.

It was proved that the hay had been sown in the Autumn of the year 1892; the wheat in September, 1893; and the barley and oats in the Spring of 1894, the seed having been grown on the farm in the previous year. After the signature of the commissioner before whom the affidavit of *bona fides* in the chattel mortgage had been sworn appeared the words "A Comr., etc." It was proved that the commissioner was in fact a "commissioner authorized to take affidavits in and for the High Court;" and also that he was a solicitor employed in the office of the mortgagors' solicitors.

His Honour Judge Morgan decided the issue against the execution creditor, who appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 2nd and 3rd of October, 1894. Argument.

J. W. McCullough, for the appellant. The chattel mortgage is void, the affidavit of *bona fides* being defective. The words "A Comr., etc.," do not sufficiently identify the person before whom the affidavit has been sworn and, therefore, there is not, on the files of the Court, such an affidavit complete in itself as the Act requires: *Nisbet v. Cock*, 4 A. R. 200.

[BURTON, J. A.—That was a very different case. There the commissioner did not sign his name, and the affidavit was a nullity. The present objection is frivolous.]

The fact that the commissioner was employed in the office of the mortgagees' solicitors vitiates the affidavit: Consol. Rule 613; *Vernon v. Cooke*, [1879] W. N. 132; Barron on Bills of Sale, 2nd ed., p. 505.

[OSLER, J. A.—That rule applies only to proceedings in an action. The decision in *Vernon v. Cooke*, noted in the Weekly Notes, and cited by Mr. Barron in support of the statement just read, was reversed by the Court of Appeal, and the decision of that Court is reported in 49 L. J. Q. B. 767.]

The appellant is, at all events, entitled to succeed as to the barley and oats. "During the currency of this mortgage," must mean "before the date fixed for payment": *St-John v. Rykert*, 10 S. C. R. 278; or there must at least have been "*novus actus interveniens*," to make the mortgagees' title good as against the execution creditor: *Holroyd v. Marshall*, 10 H. L. C. 191; Hurst and Cecil's Commercial Law, p. 344; Jones on Chattel Mortgages, 4th ed., sec. 161.

Geo. A. Mackenzie, for the respondents, was directed to confine his argument to the third point, the Court intimating that in their opinion there was nothing whatever in the objections to the affidavit of *bona fides*. He con-

Argument. tended that the mortgage must be held to be "current" so long as it remained unpaid, and that at any rate the barley and oats having been grown from seed sown during the currency of the mortgage, even according to the appellant's construction, were covered by it. He also contended that no "*novus actus interveniens*" was necessary: *Horsfall v. Boisseau*, 21 A. R. 663.

October 29th, 1895. BURTON, J. A. :—

The question of fraudulent preference in this case was not argued, and the formal objections to the validity of the chattel mortgage on the grounds mentioned in the second and third reasons of appeal, were disposed of on the argument.

I also entertained a very strong opinion on the argument that the objection as to the future crops was not tenable, but the case stood over to enable us to refer to the authorities cited by the appellant's counsel.

The reference made by him to Hurst and Cecil's work on Commercial Law, does not support his contention, but on the contrary, bears out the views expressed by more than one member of the Bench during the argument, that, although at law it is impossible to assign property not in existence, to come upon the premises of the grantor at some future time, Courts of Equity have always held that in those circumstances when the goods have come upon the premises the interest of the assignee attaches, but it is not a legal but only an equitable interest which is sufficient to defeat the claim of an execution creditor.

These decisions proceed upon the ground that the document was considered as equivalent to a contract, that when the goods should be acquired, there should be an equitable property in them. Equity treating as done that which ought to be done fastens upon that property.

It is true it is only an equitable title, so that if the grantor had executed another bill of sale of all the goods upon the premises to a *bond fide* purchaser or mortgagee

without notice, the title under the first mortgage would be defeated ; but no such result follows in the case of an execution creditor who can seize only the interest of his debtor.

Judgment,
BURTON,
J.A.

The same rule applies in the case of growing crops.

The only restriction upon this proposition is, that the property must be of such a nature and so described as to be capable of ascertainment and identification.

There is to be found some warrant for his contention in the American work cited, but even there the great weight of authority is in favour of the validity of such a mortgage. In one of the cases in favour of a contrary doctrine, a reference is made to *Hope v. Hayley*, 5 E. & B. 830 ; and in another to *Congreve v. Evetts*, 10 Exch. 298, but the writers of those opinions have overlooked the distinction that in those cases there was a mere license to seize, which until acted upon passed no property either at law or in equity, but when the mortgagee had acted upon the license and seized the property, the mortgagor could not dispute his title, and neither could an execution creditor. It is in such cases, and such cases only, that the *novus actus* referred to by Lord Chelmsford in *Holroyd v. Marshall*, 10 H. L. C. 191, is requisite.

Another point not taken in the reasons of appeal, and raised for the first time in this Court was that, even if after grown crops might be so affected, it was confined to crops planted during the currency of the mortgage, which it was contended could apply only to crops planted before the mortgage became payable.

I am of opinion that so limited a construction should not be put upon these words, but that the true meaning is "during the continuance of the security."

The appeal should, I think, be dismissed.

OSLER, J. A. :—

It was contended that the mortgagees were not entitled as against the execution creditor to the crops which came into existence after the date of mortgage ; nothing further having been done to perfect their title to them before

Judgment.

OSLER,
J.A.

the execution was lodged ; in other words, that there had been no *novus actus interveniens*, in the absence of which the title of the execution creditor would prevail.

It was also contended that as to all crops sown after the mortgage became due, viz., after the 1st November, 1893, the execution creditor was, at all events, entitled to succeed, these not having been sown "during the currency of this mortgage."

The case being that of a covenant that the after sown crops should be subject to the mortgage, and not of a mere license to the mortgagee to seize them, the first point is concluded by the case of *Holroyd v. Marshall*, 10 H. L. C. 191, where it is expressly held that as to future goods brought on the premises, the description of which comes within the covenant of the mortgage, the title of the mortgagee is preferable to that of the execution creditor, even though there has been no *novus actus interveniens*. All that Lord Chelmsford said in his judgment, which the appellant relied upon, as to the necessity for a *novus actus interveniens* was that, if it was necessary, then in his opinion the evidence shewed that it existed in that case. The question always is, whether the property can be sufficiently identified as that which the mortgagor has covenanted shall be subject to the mortgage upon its coming into existence. If it can, the execution creditor must fail, because he can get no better title than the execution debtor, and must take subject to all charges which the debtor has validly created upon it. As Lopes, J., said in *Lazarus v. Andrade*, 5 C. P. D. 318: "The principle deducible (from *Holroyd v. Marshall*) is, that property to be afterwards acquired, if described so as to be capable of being identified, may be, not only in equity but also at law, the subject matter of a valid assignment for value." We acted upon the law as laid down in these cases, in *Coyne v. Lee*, 14 A. R. 503, and *Horsfall v. Boisseau*, 21 A. R. 663. See also *Hamilton v. Harrison*, 46 U. C. R. 127; *Clements v. Mathews*, 11 Q. B. D. 808; *Thomas v. Kelly*, 13 App. Cas. 506; *Tailby v. Official Receiver*, 13 App. Cas. 529.

Judgment.

O'LEARY,
J.A.

The second point relates to the construction of the mortgage, and was raised, I think, for the first time on the hearing of the appeal. If well taken, the execution creditor should succeed as to the spring crops of 1894, but only as to these. What is the meaning of the expression crops sown or to be sown during the "currency of this mortgage?" It is not a term of art or technical term, and the mortgagees insist that its meaning is so long as the mortgage remains as a security—so long as anything continues due upon it. With this contention I am unable to agree. If sound, it would lead to great inconvenience, and I think place creditors at a great disadvantage. Instead of the time within which the future crops were to be subject to the mortgage being certain and defined, the opposite would be the case, and crops even sown after litigation had begun might be covered by it. I think it was intended to limit the time, and that the natural meaning of the expression is "during the time or term allowed for payment of the mortgage—while that time is running, while the mortgage is current." We speak of a note being current with reference to the period between its making and its due date; and the very expression imports an allusion to the time when the obligation ought to be performed, where a time is set. The parties must be taken, as the Court said in *St. John v. Rykert*, 10 S. C. R. 278, to contemplate payment *ad diem* and not *post diem*, and had it been intended that fresh security should arise or be taken after default in payment at the time agreed on, that should have been, just as in the case of interest, expressly stipulated for. Had the agreement related to interest, as to pay interest at eight per cent. "during the currency of the mortgage," I think it could not have received a larger interpretation than an agreement to pay interest at that rate "until payment" of the principal, or "until paid": *St. John v. Rykert*, 10 S. C. R. 278; *Powell v. Peck*, 15 A. R. 138. I cannot regard the expression as equivalent to "during the continuance of the mortgagees' security," or "so long as any money shall remain due upon the security":

Judgment. *Popple v. Sylvester*, 22 Ch. D. 98—terms which imply that the mortgage may exist after the day fixed for payment, and contemplate a possible default.

OSLER,
J. A.

The judgment below must be varied by declaring that the execution creditor succeeds as to the barley and the oats, and the mortgagees as to the wheat and the hay. Success being divided in the result, and the point on which I would in part allow the appeal having been first taken in this Court, I think each party should bear his own costs throughout.

MACLENNAN, J. A. :—

I agree with my brother Burton, and I think, moreover, that the claimants would be entitled to the crops under their real estate mortgage, without reference to the chattel mortgage.

Appeal dismissed with costs,
OSLER, J. A., *dissenting in part.*

KELLY V. BARTON.

KELLY V. ARCHIBALD.

Arrest—Notice of Action—Malice—R. S. [O. ch. 73.

Statement. THESE were appeals by the defendants Barton and Archibald from the judgments of the Chancery Division, reported 26 O. R. 608, and were argued together before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 27th and 28th of November, 1895.

W. R. Riddell, for the appellants.

McCarthy, Q. C., and *Biggar*, Q. C., for the respondents.

At the conclusion of the argument the appeals were dismissed with costs.

[END OF VOLUME XXII.]

APPENDIX.

Cases reported in the Ontario Appeal Reports disposed of by the Judicial Committee of the Privy Council and the Supreme Court of Canada, since the publication of Volume 21, up to December 15th, 1895.

Judicial Committee of the Privy Council.

IN RE VIRGO AND TORONTO, 20 A. R. 435.—Judgment of the Supreme Court of Canada, 22 S. C. R. 447, affirmed; November 16th, 1895.

Supreme Court of Canada.

BARNES V. DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION, 22 A. R. 68.—Appeal dismissed; December 9th, 1895, *sub nom.* DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION V. BRADT.

BOND V. TORONTO RAILWAY CO., 22 A. R. 78.—Appeal dismissed; May 15th, 1895.

IN RE CHRISTIE AND TORONTO JUNCTION, 22 A. R. 21.—Appeal dismissed subject to a variation as to damages, which are increased; December 9th, 1895.

CLARKSON V. MCMASTER, 22 A. R. 138.—Appeal allowed; December 9th, 1895.

DEROCHIE V. CORNWALL, 21 A. R. 279.—Appeal dismissed; March 11th, 1895; 24 S. C. R. 301.

EVANS V. KING, 21 A. R. 519.—Appeal dismissed; May 6th, 1895; 24 S. C. R. 356.

GIBSON V. NORTH EASTHOPE, 21 A. R. 504.—Appeal dismissed; March 22nd, 1895.

GOODERHAM V. TORONTO, 19 A. R. 641.—Appeal allowed; March 11th, 1895.

GOSNELL V. TORONTO RAILWAY COMPANY, 21 A. R. 553.—Appeal dismissed; May 6th, 1895.

GRANT V. NORTHERN PACIFIC JUNCTION R. W. Co., 21 A. R. 322.—Appeal dismissed; May 6th, 1895; 24 S. C. R. 546.

GRINSTED V. TORONTO RAILWAY COMPANY, 21 A. R. 578.—Appeal dismissed; May 6th, 1895; 24 S. C. R. 570.

IN RE HARWICH AND RALEIGH, 21 A. R. 677.—Appeal quashed; May 18th, 1895.

HEADFORD V. MCCLARY MANUFACTURING Co., 21 A. R. 164.—Appeal dismissed; March 11th, 1895; 24 S. C. R. 291.

HURDMAN V. CANADA ATLANTIC R. W. Co., 22 A. R. 292.—Appeal dismissed; December 9th, 1895.

HUSON V. SOUTH NORWICH, 19 A. R. 343.—See *Huson v. South Norwich*, 24 S. C. R. 145, and *In re Prohibitory Liquor Laws*, 24 S. C. R. 170. An appeal to the Judicial Committee is standing for judgment.

INNES V. FERGUSON, 21 A. R. 323.—Appeal and cross-appeal dismissed; March 11th, 1895.

JARVIS V. TORONTO, 21 A. R. 395.—Appeal dismissed; January 15th, 1895.

KENNY V. CALDWELL, 21 A. R. 110.—Appeal dismissed; January 15th, 1895.

KERR; ENGINE CO. v. FRENCH RIVER TUG CO., 21 A. R. 160.—Appeal dismissed; March 11th, 1895.

LEWIS v. ALEXANDER, 21 A. R. 613.—Appeal dismissed; May 6th, 1895; 24 S. C. R. 551.

IN RE LOCAL OPTION ACT, 18 A. R. 572.—See *Huson v. South Norwich*, 24 S. C. R. 145, and *In re Prohibitory Liquor Laws*, 24 S. C. R. 170. An appeal to the Judicial Committee is standing for judgment.

MCCLELLAND v. ARMSTRONG, 21 A. R. 183.—Appeal allowed; March 11th, 1895.

MCKINNON v. LUNDY, 21 A. R. 560.—Appeal allowed; June 26th, 1895.

NASON v. ARMSTRONG, 21 A. R. 183.—Appeal allowed; March 11th, 1895.

O'CONNOR v. HAMILTON BRIDGE Co., 21 A. R. 596.—Appeal dismissed; May 6th, 1895.

IN RE ONTARIO EXPRESS AND TRANSPORTATION Co., 21 A. R. 646.—Appeal quashed; May 16th, 1895.

ROBERTSON v. GRAND TRUNK R. W. Co., 21 A. R. 204.—Appeal dismissed; June 26th, 1895.

SAMUEL v. FAIRGRIEVE, 21 A. R. 418.—Appeal allowed; January 15th, 1895: *sub nom.* CRAIG v. SAMUEL, 24 S. C. R. 278.

SANGSTER v. T. EATON Co., 21 A. R. 624.—Appeal dismissed; April 2nd, 1895.

SCOTTEN v. BARTHEL, 21 A. R. 569.—Appeal allowed; May 6th, 1895; 24 S. C. R. 367.

SEGSWORTH v. ANDERSON, 21 A. R. 242.—Appeal allowed; January 15th, 1895.

TRENTON v. DYER, 21 A. R. 379.—Appeal dismissed ; May 6th, 1895 ; 24 S. C. R. 474.

WEALLEANS v. CANADA SOUTHERN R. W. Co., 21 A. R. 297.—Appeal allowed ; March 11th, 1895 : *sub nom.* MICHIGAN CENTRAL R. W. Co. v. WEALLEANS, 24 S. C. R. 309.

IN RE WILSON AND ELGIN, 21 A. R. 585.—Appeal dismissed ; March 18th, 1895.

WRIGHT v. ARMSTRONG, 21 A. R. 183.—Appeal dismissed ; March 11th, 1895.

YORK v. OSGOOD, 21 A. R. 168.—Appeal dismissed ; March 11th, 1895 ; 24 S. C. R. 282.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME.

BEING DECISIONS IN THE

COURT OF APPEAL FOR ONTARIO.

ABSCONDING DEBTOR.

See ARREST, 2.

ACCORD AND SATISFACTION.

Damages—Negligence—Separate Trial of Issue.—Payment to a person injured by an accident on a railway of the sum of ten dollars, and a receipt signed by him for "the sum of ten dollars, such sum being in lieu of all claims I might have against said company on account of an injury received on the 6th day of May 1893," may constitute accord and satisfaction.

An issue as to the effect of the payment and receipt and its procurement by fraud, may be tried by the Judge presiding at the trial of an action to recover damages for the alleged injury, and need not necessarily be left to the jury.

Judgment of the Queen's Bench Division, 26 O. R. 19, reversed. *Haist v. Grand Trunk Railway Company of Canada*, 504.

ACKNOWLEDGMENT.

See LIMITATION OF ACTIONS.

ACT OF GOD.

See MUNICIPAL CORPORATIONS, 8.

ACTION.

1. *Election of Remedies—Inconsistent Remedies—Estoppel—Assignments and Preferences.*—A creditor cannot take the benefit of the consideration for a transfer of goods and at the same time attack the transfer as fraudulent.

An assignee for the benefit of creditors has no higher right in this respect.

A creditor suing in the name of the assignee obtained judgment against third persons, for the payment to him as part of the debtor's estate of the proceeds of promissory notes given to the latter for part of the purchase money of his stock-in-trade:—

Held, that it was then too late for him to attack the sale as fraudulent.

Beemer v. Oliver, 10 A. R. 656, referred to.

On the argument of the appeal evidence as to the prior action was admitted, and on this evidence and objection then taken the judgment of FERGUSON, J., setting aside the

sale, was reversed, without costs here or below. *Wood et al. v. Reesor et al.*, 57.

2. *Negligence—Damages—Highways—Turkey.*]—The owner of a turkeycock which without negligence strays upon the highway contrary to a by-law of the municipality is not liable for damages resulting from a horse taking fright and running away at the sight of the bird acting as turkeycocks usually do.

Judgment of the County Court of Lincoln affirmed. *Zumstein v. Shrumm*, 263.

See *Henderson v. Bank of Hamilton*, 414—BANKRUPTCY AND INSOLVENCY, 1, 2.

ADMINISTRATION.

See LIMITATION OF ACTIONS.

ADVICE OF COURT.

See EXECUTORS AND ADMINISTRATORS.

AMENDMENT.

See COUNTY COURT, 1.

ARBITRATION AND AWARD.

See MUNICIPAL CORPORATIONS, 1—WATER AND WATERCOURSES, 2.

ARREST.

1. *Trespass—Police Magistrate—Jurisdiction—Warrant to Compel Attendance of Witness—Right of Police to Search Witness Arrested—*

Duty of Constable—R. S. C. ch. 174, sec. 62—Malicious Arrest—Imprisonment—Damages.]—Where a police magistrate acting within his jurisdiction under R. S. C. ch. 174, sec. 62, issues his warrant for the arrest of a witness who has not appeared in obedience to a subpoena, he is not, in the absence of malice, liable in damages, even though he may have erred as to the sufficiency of the evidence to justify the arrest.

Judgment of the Common Pleas Division, 24 O. R. 576, affirmed.

In an action for false imprisonment judgment cannot be entered upon answers to questions submitted to the jury, and a finding, in answer to a question, of a certain amount of damages, is not equivalent to the general verdict which must be given by them.

The right of police to search or handcuff a person arrested on a warrant to compel attendance as a witness and the duty of the constable on making the arrest, considered.

Judgment of the Common Pleas Division, 24 O. R. 576, reversed, MACLENNAN, J.A., dissenting. *Gordon v. Denison*, 315.

2. *Attachment—Absconding Debtor—Reasonable and Probable Cause.*]

—Where a man, having numerous creditors in Ontario, leaves the Province openly to reside in the United States after publicly announcing his intention so to do, without paying his creditors, and after his departure it is found that statements made by him as to property available to pay his debts are false and that nothing is in fact available for that purpose, his arrest upon civil process upon his return to Ontario for a temporary purpose, intending to return to the United States, is justifiable.

Judgment of the Queen's Bench Division, 25 O. R. 22, affirmed." *Coffey v. Scane*, 269.

See *Kelly v. Barton*, 522.

ASSESSMENT AND TAXES.

Insurance Company—Reserve Fund—Interest—Income.—Interest earned on the statutory reserve fund of a life insurance company is part of its assessable income.

The decision of the Judge of a County Court on a question of assessment is final, when he is dealing with property that is assessable at all.

Judgment of FERGUSON, J., 24 O. R. 643, affirmed. *Confederation Life Association v. City of Toronto*, 166.

See MUNICIPAL CORPORATIONS, 7.

ASSIGNMENTS AND PREFERENCES.

See BANKRUPTCY AND INSOLVENCY.

ATTACHMENT.

See ARREST, 2.

AUCTIONEER.

See MUNICIPAL CORPORATIONS, 2.

BANKRUPTCY AND INSOLVENCY.

1. *Assignments and Preferences—Compromise by Assignee—Action by Creditor—R. S. O. ch. 124, sec. 7.*—Where a creditor obtains an order under sub-section 2 of section 7 of

the Assignments and Preferences Act, R. S. O. ch. 124, authorizing him to bring an action in the assignee's name, the action as brought must be such as is justified by the scope of the order.

A creditor suing in the name of the assignee under this sub-section cannot attack the *bona fides* of a compromise entered into before his action was brought between the assignee and the defendant, when the defendant cannot be restored to his original position.

Whether sub-section 2 is not confined to cases in which an exclusive right of suing is given to the assignee by sub-section 1 : *quære*.

Judgment of the Queen's Bench Division reversed, MACLENNAN, J. A., dissenting. *Campbell v. Hally*, 217.

2. *Assignments and Preferences—Exclusive Right of Action—R. S. O. ch. 124, sec. 7 (2)—Release.*—A creditor may, after an assignment for the benefit of creditors, and after the execution by him and the other creditors of the assignor of a release of their debts in consideration of payment of a composition, bring an action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment.

Such an action may be brought with the assignee's consent in his name without any order under sub-section 2 of section 7 of the Assignments Act, but without such an order the recovery will be for the benefit of the estate.

Judgment of the County Court of York reversed. *Doull v. Kopman*, 447.

3. *Composition Agreement—Se-
solution of Creditors—Fraud.*—A

resolution passed and signed by creditors at a meeting called to consider the debtor's position, that the debtor "be allowed a settlement at six, nine and twelve months, at the rate of twenty-five cents in the dollar in equal payments without interest" does not, in itself, operate as satisfaction of their claims. Payment in accordance with its terms is essential.

A creditor who assents to and signs the resolution, but before doing so makes a secret bargain with the debtor for payment of his claim in full is not debarred from suing the debtor for the original indebtedness upon default in payment of the composition according to the terms of the resolution, the debt not being in fact released or otherwise discharged; HAGARTY, C.J.O., dissenting on this point.

Per HAGARTY, C.J.O. :—The general doctrine as to "fraud on compositions" applies to a case of this kind, although there is no formal release under seal.

Judgment of the County Court of York reversed, HAGARTY, C.J.O., dissenting. *Weese v. Banfield*, 489.

See ACTION, 1—BILLS OF SALE AND CHATTEL MORTGAGES.

BANKS AND BANKING.

See *Henderson v. Bank of Hamilton*, 414.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Endorsement by Stranger—53 *Vict. ch. 33, secs. 56 and 88 (D.)*.—Where a promissory note payable to a named payee is indorsed by an-

other person before delivery of the note to the payee, the former is liable as indorser to a holder in due course by virtue of secs. 56 and 88 of the Bills of Exchange Act, 53 *Vict. ch. 33 (D.)*.

Judgment of the County Court of York reversed. *Duthie v. Essery*, 191.

See PARTNERSHIP.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Possession—Creditors—Assignments and Preferences*—55 *Vict. ch. 26, sec. 4 (O.)*.—The creditors against whom by section 4 of 55 *Vict. ch. 26 (O.)* taking possession under a defective chattel mortgage is declared to be of no avail, are creditors having executions in the sheriff's hands at the time possession is taken, or simple contract creditors who, at that time, have commenced proceedings on behalf of themselves and other creditors to set aside the mortgage, or an assignee for the general benefit of creditors who, however, stands in no better position; and possession taken before the assignment, cures all formal defects.

Judgment of MACMAHON, J., reversed, HAGARTY, C.J.O., dissenting. *Clarkson v. McMaster*, 138.

2. *Affidavit of Bonu Fides—Designation of Commissioner—Solicitor's Power to take Affidavit—Growing Crops—Currency of Mortgage*.—An affidavit of *bona fides* in a chattel mortgage sworn before a person who is in fact a Commissioner authorized to take affidavits in and for the High Court, but who places after his signature in the jurat only the words "A Comr., etc.," is good.

Such an affidavit may be made be-

fore a solicitor employed in the office of the mortgagees' solicitors.

Crops to be grown may be covered by a chattel mortgage and a chattel mortgage of "crops which may be sown during the currency of this mortgage," covers crops sown after the mortgage falls due but remains unpaid; OSLER, J. A., dissenting on this point.

Judgment of the County Court of York affirmed. *The Canada Permanent Loan and Savings Co. v. Todd*, 515.

See MORTGAGE, 2—EXECUTION.

BOND.

See DURESS.

BY-LAW.

See MUNICIPAL CORPORATIONS, 6, 7, 9.

CARRIERS.

Knowledge of Special Purpose—Damages—Non-delivery of Animals.]

—Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company, including anticipated profits.

Judgment of the County Court of Wentworth reversed. *Kennedy v. American Express Company*, 278.

CASES.

Beemer v. Oliver, 10 A. R. 656, referred to.]—See ACTION, 1.

Beer v. Stroud, 19 O. R. 10, considered.]—See WATER AND WATER-COURSES, 2.

Bernardin v. North Dufferin, 19 S. C. R. 581, considered.]—See MUNICIPAL CORPORATIONS, 6.

Re Farlinger and Morrisburgh, 16 O. R. 722, distinguished.] — See MUNICIPAL CORPORATIONS, 7.

Gore District Mutual Fire Insurance Company v. Samo, 2 S. C. R. 411, applied.]—See INSURANCE, 2.

Laing v. Ontario Loan and Savings Company, 46 U. C. R. 114, explained.]—See MORTGAGE, 2.

Re McKay v. Martin, 21 O. R. 104, considered.] — See COUNTY COURT, 2.

Murray v. Canada Central R. W. Co., 7 A. R. 646, followed.]—See EVIDENCE.

Smith v. Baker, [1891] A. C. 325, applied.]—See NEGLIGENCE.

COMPANY.

Director—Personal Liability for Wages—“Labourers, Servants and Apprentices”—*R. S. O. ch. 157, sec. 68.*]—A person employed as foreman of works, who hires and dismisses men, makes out pay-rolls, receives and pays out money for wages, and does no manual labour, and in addition to receiving pay for his own services at the rate of \$5 a day, payable fortnightly, is paid for the

use of machinery belonging to him and of horses hired by him, is not a labourer, servant or apprentice within the meaning of section 68 of the Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, and cannot recover against the directors personally.

Judgment of the County Court of Brant affirmed. *Welch v. Ellis*, 255.

COMPENSATION.

See IMPROVEMENTS UNDER MISTAKE OF TITLE.

COMPOSITION AGREEMENT.

See BANKRUPTCY AND INSOLVENCY, 3.

CONSTABLE.

See ARREST, 1.

CONTRACT.

1. *Printing Debentures—Sale of Goods—Work, Labour and Materials—Statute of Frauds.*—A contract to print debentures in a special form on paper supplied by the printers is a contract for the sale of goods and chattels, and not a contract for work, labour and materials, and is within the Statute of Frauds, OSLER, J.A., *dubitante*.

Judgment of ARMOUR, C.J., affirmed. *The Canada Bank Note Engraving and Printing Company v. The Toronto Railway Company*, 462.

2. *Sale of Goods—Statute of Frauds—Memorandum in Writing—Denial of Agent's Authority—Principal and Agent.*—A letter referring to

the terms of a contract made by an agent, but denying the authority of the agent to make it, is a sufficient memorandum within the Statute of Frauds.

Judgment of the Common Pleas Division affirmed, BURTON J.A. dissenting. *Haubner v. Martin*, 468.

See MUNICIPAL CORPORATIONS, 6.

COSTS.

See *Henderson v. Bank of Hamilton*, 414—COUNTY COURT, 2—EXECUTORS AND ADMINISTRATORS.

COUNTY COURT.

Jurisdiction—Liquidated Amount—Guaranty—Amendment—Statute of Frauds.—The County Court has no jurisdiction to entertain an action for more than \$200 on a guaranty, in general terms, of payment of the price of goods, there being no liquidation or ascertainment of the amount as between the vendor and the guarantor, a liquidation or ascertainment by the debtor not binding the guarantor.

Where an action was for two unliquidated claims each within but together beyond the jurisdiction of the County Court, the plaintiff was allowed after judgment to amend by abandoning one of them.

As a written memorandum of an oral guaranty is required only for the purpose of evidence a letter or other writing subsequently given by the guarantor sufficiently shewing the terms of his undertaking will suffice.

A letter shewing the terms, written by the guarantor partly on his own behalf and partly on behalf of a firm of debtors and signed by him in

the firm name and in his own name for them *per proc.*, is sufficient to bind him.

Judgment of the County Court of Essex varied. *Thomson v. Eede*, 105.

2. *Jurisdiction—Removal of Action—54 Vict. ch. 14 (O.)—Court of Appeal—Practice—Certificate of Judgment—Summary Order for Repayment of Money.*—An action cannot be removed under 54 Vict. ch. 14 (O.) from a County Court to the High Court after verdict or judgment in the County Court in favour of the plaintiff, leaving that verdict or judgment in force, with the right to either party to move against it in the High Court.

Re McKay v. Martin, 21 O. R. 104, considered.

Judgment of the County Court of Haldimand reversed.

Where the certificate of judgment of the Court of Appeal by inadvertence directed the dismissal of a County Court action with costs, instead of merely setting aside the judgment in the County Court for want of jurisdiction, the certificate was on summary application amended and repayment of costs taxed and paid under it directed. *Sherk v. Evans*, 242.

COURT OF APPEAL.

See COUNTY COURT, 2.

COVENANT.

Lease—Improvements—“Buildings and Erections”—Earth-filling.—A covenant by the lessor in a lease of a parcel of land covered by water to pay at the end of the term for “the buildings and erections that shall or may then be on the demised

premises,” does not bind him to pay for crib-work and earth-filling done upon the parcel in question by which it was raised to the level of the adjoining dry land and made available as a site for warehouses.

Judgment of the Chancery Division reversed. *Adamson v. Rogers*, 415.

See MORTGAGE, 3.

CROWN.

See IMPROVEMENTS UNDER MISTAKE OF TITLE.

DAMAGES.

See Church v. City of Ottawa, 348—*Henderson v. Bank of Hamilton*, 414—ACCORD AND SATISFACTION—ACTION, 2—ARREST, 1—CARRIERS—DEFAMATION—MUNICIPAL CORPORATIONS, 3, 8—RAILWAYS, 1—WATER AND WATERCOURSES, 2.

DEFAMATION

Libel—Pleading—Evidence—Damages—Practice—Consol. Rules 399 and 573.—Facts intended to be relied on in mitigation of damages in a libel action must be set out in the statement of defence, and unless this is done they can not be given in evidence.

Consolidated Rule 399 is inconsistent with Consol. Rule 573, and governs.

The defendant may plead in mitigation of damages that the article complained of was published in good faith in the usual course of business.

Judgment of *ROBERTSON, J.*, reversed. *Beaton v. The Intelligencer Printing and Publishing Company*, 97.

DESCRIPTION.

See SALE OF LAND.

DIRECTOR.

See COMPANY.

DRAINAGE.

See MUNICIPAL CORPORATIONS, 4, 5, 6, 8.

DURESS.

Bond — Illegality — R. S. O. ch. 234.—A bond to secure the payment of the cost of maintaining at an industrial school a boy under fourteen years of age, convicted of larceny, and who otherwise came within the requirements of section 7 of the Act respecting Industrial Schools, given in consequence of the Judge's statement that in default the boy would be sent to the reformatory, is void, this being in law duress.

Per OSLER, J. A. :—The bond was also illegal and void on the ground that not being required by law, it was given in order that the law might be put in force, which ought to have been put in force and acted upon without it.

Judgment of the County Court of Elgin reversed, *HAGARTY, C. J. O.*, dissenting. *The Corporation of the City of St. Thomas v. Yearsley*, 340.

ELECTION OF REMEDIES.

See ACTION, 1.

EMBLEMENTS.

See MORTGAGE, 2.

ESTOPPEL.

See ACTION, 1—PARTNERSHIP.

EVIDENCE.

Discovery of New Evidence—New Trial — Discretion — Appeal.—Allowing a new trial on the ground of the discovery of new evidence is a matter of legal discretion, and where the subject matter of the action was of a trifling nature and a Divisional Court ordered a new trial on affidavits shewing merely the discovery of further evidence corroborative of the evidence of the trial, the order was set aside. *Murray v. Canada Central R. W. Co.*, 7 A. R. 646, followed. Judgment of the Common Pleas Division reversed. *Trumble v. Hortin*, 51

See DEFAMATION — EXTRADITION — MUNICIPAL CORPORATIONS, 1.

EXECUTION.

Exemptions—Execution — R. S. O. ch. 64, sec. 2—Bills of Sale and Chattel Mortgages—Description.—An execution debtor can do as he pleases with the statutory exemptions and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor.

Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue and is not to be left to the sheriff to deal with.

Judgment of the County Court of Ontario reversed.

"One piano, Dominion make, number 2773," is a sufficient description in a bill of sale.

Judgment of the County Court of Ontario affirmed. *Field v. Hart*, 449.

EXECUTORS AND ADMINISTRATORS.

Trusts and Trustees—Just Allowances—Costs of Unsuccessful Litigation—Advice of Court—R. S. O. ch. 110, sec. 37.—Where the administrators of the estate of a deceased assignee for creditors defended in good faith an action brought by his successor in the trust to recover damages for breach of trust committed by the intestate and being unsuccessful were obliged to pay the plaintiff's costs and those of their own solicitors, they were held entitled to credit for these payments in passing their accounts.

Where it is plain that a dispute can be settled only by litigation it is not necessary for a trustee to ask the advice of the Court before defending.

Judgment of the Surrogate Court of Grey reversed. *In re Williams*, 196.

EXEMPTIONS.

See EXECUTION.

EXTRADITION.

1. *False Document—Forgery—Evidence.*—The prisoner's brother opened a bank account in an assumed name and drew cheques from time to time thereon. Several of these cheques were paid, but the last one the prisoner cashed at his own bank, knowing that there were no funds to meet it:—

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A. That there was evidence from which it might reason-

ably be inferred that the opening of the account in the assumed name was part of a conspiracy between the prisoner and his brother to defraud and that there was, therefore, the fraudulent uttering of a false document which would constitute forgery.

Per BURTON, and OSLER, JJ.A. That as the account was a genuine one, and there was no false representation as to the drawer of the cheque, the offence of forgery was not made out:—

Held, also, per HAGARTY, C.J.O., and MACLENNAN, J.A. That it is not necessary to shew in extradition proceedings that the prisoner is liable to conviction of the crime charged according to the law of the demanding country.

Per BURTON, and OSLER, JJ.A. That it must be shewn that the prisoner is liable to conviction for the crime charged, according to the law of both countries.

In the result the judgment of the Common Pleas Division 26 O. R. 163, was affirmed. *In re Cornelius F. Murphy*, 386.

FALSE DOCUMENT.

See EXTRADITION.

FORGERY.

See EXTRADITION.

FRAUD.

See BANKRUPTCY AND INSOLVENCY, 3.

FRAUDS, STATUTE OF.

See CONTRACT—COUNTY COURT, 1.

GROWING CROPS.

See **BILLS OF SALE AND CHATTEL MORTGAGES, 2**

GUARANTY.

See **COUNTY COURT, 1—PRINCIPAL AND SURETY.**

ILLEGALITY.

See **DURESS.**

**IMPROVEMENTS UNDER MIS-
TAKE OF TITLE.**

Compensation — Occupation Rent — Crown—R. S. O. ch. 100, sec. 30.]

—The defendants, owners of land adjoining the bank of the Niagara River, built at great expense stairways and elevators and made paths from the top of the bank to the water's edge of the river to enable visitors to descend to see the view, and large sums were received for the use of these facilities. Expensive repairs to the stairways, elevators and paths were from time to time necessary, owing to their exposed position, and the defendants knew that they had no title to the bank, which was vested in the Crown:—

Held, that works of this kind were not lasting improvements within the meaning of section 30 of R. S. O. ch. 100, and that both on this ground and on the ground that they knew they had no title the defendants could not recover compensation.

Semle: The section would not affect the Crown and the title being in the Crown when the improvements were made the Crown's

grantee would take the land free from any lien.

In cases coming within the section the amount by which the value of the land has been enhanced is to be allowed and the cost or value of the improvements is not the test:—

Held, also, that the defendants were not chargeable with the profits made by them but only with a fair occupation rent for the land.

Judgment of **STREET, J.**, varied. *The Commissioners for the Queen Victoria Niagara Falls Park v. Colt, 1.*

See **COVENANT.**

INJUNCTION.

See **WATER AND WATERCOURSES, 2.**

INSURANCE.

1. *Fire Insurance—Interim Contract—Notice to Terminate—R. S. O. ch. 167, sec. 114 (19).]*—Upon an application for insurance for four years and the giving of his note for the premium, the applicant received an interim receipt providing among other things that the insurance was subject to the approval of the directors, who should have power to cancel the contract within fifty days by letter, and that unless the receipt was followed by a policy within fifty days the contract insurance should wholly cease and determine. No notice of cancellation was given and no policy was issued:—

Held, per HAGARTY, C. J. O. That this was a contract of insurance that could be terminated only in accordance with the nineteenth statutory condition, and that at any rate there had been a waiver of the provision as to cessation of the risk.

Per BURTON, and OSLER, JJ.A. That this was a mere incomplete or provisional contract of insurance for four years, and also an actual contract for fifty days, which came to an end by effluxion of time, and that the nineteenth statutory condition did not apply to the provisional contract.

Per MACLENNAN, J. A. That there was a contract of insurance, and that the provision for determination by effluxion of time was a variation from the statutory conditions, which was not binding, not being printed in the required mode.

In the result the judgment of the Queen's Bench Division, 25 O. R. 100, in favour of the insured, was affirmed. *Barnes v. Dominion Grange Mutual Fire Insurance Association*, 68.

2. *Fire Insurance — Assignment of Part of Insured Property—Breach of Statutory Conditions.*—Where a policy of insurance in one sum covers buildings and chattels, and the land upon which the buildings stand is conveyed by deed without the consent of the insurers in breach of the fourth statutory condition, the policy is avoided *in toto* and does not remain in force as to the chattels.

Distinction between the breach of that condition and the first condition pointed out.

Gore District Mutual Fire Insurance Co. v. Samo, 2 S. C. R. 411, applied.

Judgment of ARMOUR, C. J., reversed. *Dunlop v. Osborne and Hibbert Farmers Mutual Fire Insurance Co.*, 364.

See ASSESSMENT AND TAXES.

INTEREST.

See PRINCIPAL AND SURETY.

JUDGMENT.

See COUNTY COURT, 2—PARTNERSHIP.

JURISDICTION.

See COUNTY COURT, 1, 2.

JURY.

See RAILWAYS, 2.

JUSTICE OF THE PEACE.

See POLICE MAGISTRATE.

LANDLORD AND TENANT.

1. *Lease—Surrender in Law.*—Acts relied on as shewing the acceptance by the landlord of the surrender of a lease and as effecting a surrender by operation of law must be such as are not consistent with the continuance of the term; and using the key left by the tenants at the landlords' office, putting up a notice that the premises are "to let," making some trifling repairs, and cleaning the premises are ambiguous acts which are not sufficient for this purpose.

Judgment of the County Court of York affirmed. *The Ontario Industrial Loan and Investment Company v. O'Dea*, 349.

2. Lease—Assignment of Lease Without Consent—Covenant to Pay Rent—Assignee's Liability to Indemnify Assignor.]—Where a lease containing a covenant against assignment without the consent of the lessors is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is liable, although the consent of the lessors may not have been procured, to repay to the assignor rent accruing due after the assignment which the latter has been obliged to pay.

Judgment of the County Court of York reversed. *Brown v. Lennox*, 442.

See COVENANT.

LEASE.

See COVENANT — LANDLORD AND TENANT.

LIBEL.

See DEFAMATION.

LICENSE.

See MUNICIPAL CORPORATIONS, 2.

LIMITATION OF ACTIONS.

Statute of Limitations—Acknowledgment—Administration.]—An acknowledgment of indebtedness by letter written after the creditor's decease by the defendant to the person who is entitled to take out letters of administration to the credi-

tor's estate and who does, after the receipt of the letter, take out such letters, is a sufficient acknowledgment within the Statute of Limitations.

Judgment of the County Court of Bruce affirmed, *MACLENNAN, J.A.*, dissenting. *Robertson v. Burrill*, 356.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 7.

MALICIOUS ARREST.

See *Kelly v. Barton*, 522—ARREST, 1.

MASTER AND SERVANT.

1. Workmen's Compensation for Injuries Act—Street Railway Cars—Defect in Arrangement of Plant—Negligence—55 Vict. ch. 30, sec. 3 (O.).]—Having car buffers of different heights, so that in coupling the buffers overlap and afford no protection to the person effecting the coupling, is a "defect in the arrangement of the plant" within the meaning of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30, sec. 3 (O.).

Judgment of the Queen's Bench Division affirmed, *BURTON, J.A.*, dissenting. *Bond v. Toronto Railway Company*, 78.

2. Workmen's Compensation for Injuries Act, 1892—Master's Knowledge of Defect—55 Vict. ch. 30, sec. 6, sub-sec. 3 (O.).]—Where the workman is aware that the employer knows of the defect that ultimately causes the injury he is not bound under sub-section 3 of section 6 of the Workmen's Compensation for

Injuries Act, 1892 [55 Vict. ch. 30 (O.)], to give information thereof to the employer, and his failure to give information in other cases will not bar his right of action if a reasonable excuse is shewn for the omission, this being a question of fact for the jury.

Where both the employer and the workman know of the defect and it is the workman's own duty to see that the defect is remedied but orders given by him with that object are not carried out, he cannot recover.

Judgment of the Common Pleas Division affirmed. *Truman v. Rudolph*, 250.

See COMPANY—PRINCIPAL AND AGENT.

MAXIM.

"*Volenti non fit injuria.*"] — See NEGLIGENCE.

MORTGAGE.

1. *Charge—Executory Agreement—Registry Act—Witness—R. S. O. ch. 114, secs. 44, 45 and 80.*]—A letter in the following form: "I agree to charge the east half of lot number nineteen * * with the payment of the two mortgages * * amounting to \$750 * * and I agree on demand to execute proper mortgages of said land to carry out this agreement or to pay off the said mortgages," is not a mere executory agreement, but operates as a present charge in favour of the mortgagees named upon the lands described and may be registered against them.

Per MACLENNAN, J.A.—An affidavit of execution for the purpose of registration may be made by a person who in fact witnesses the signature,

but who writes his name, not as witness but as the person to whom such a letter is addressed.

Per OSLER, and MACLENNAN, J.J. A.

—Where an instrument is in fact registered, section 80 of the Registry Act cures any irregularity in the proof for registration.

Judgment of the Chancery Division reversed. *Hoofstetter v. Hooker*, 175.

2. *Default—Emblements—Bills of Sale and Chattel Mortgages—Entry by Mortgagee.*]—A mortgagor after default is, as far as crops growing upon the mortgaged land are concerned, in the position of a tenant at sufferance, and cannot by giving a chattel mortgage upon the crops confer a title thereto upon the chattel mortgagee to the prejudice of the mortgagee of the land, or any one claiming under him, who has entered into possession of the land before the crop is harvested.

Laing v. Ontario Loan and Savings Company, 46 U. C. R. 114. explained.

Judgment of the County Court of Brant reversed. *Bloomfield v. Hellyer*, 232.

3. *Covenant—Purchaser of Equity of Redemption.*]—The purchaser of land, subject to a mortgage, does not *ipso facto* become personally liable to the mortgagee for the amount of the mortgage, nor does he become liable to the mortgagee by entering into a covenant with his vendor to pay the mortgage. In other words, the burden of a covenant to pay mortgage moneys does not run with the mortgaged lands.

Judgment of the Queen's Bench Division affirmed. *Canada Landed and National Investment Co. v. Shaver*, 377.

MUNICIPAL CORPORATIONS.

1. *Arbitration and Award—Appeal to Judge—Increasing Award—Evidence—55 Vict. ch. 42, secs. 401, 404 (O.)—Arbitrator as a Witness.*—*Held, per HAGARTY, C.J.O., and MACLENNAN, J.A.* In an arbitration within sections 401 and 404 of the Consolidated Municipal Act, 55 Vict. ch. 42 (O.), a judge to whom an appeal is taken against the award cannot, merely on his own understanding of the evidence and on a view of the premises, increase the amount awarded.

Per BURTON, and OSLER, J.J.A. The judge can deal with the award on the merits, and can increase or reduce the amount or vary the decision as to costs.

In the result the judgment of ROSE, J., 24 O. R. 443, was affirmed.

An arbitrator may be examined as a witness upon a motion to set aside an award or in an action upon an award, but such examination must be limited to matters of fact arising in connection with the reference and award, and cannot be pressed to the length of asking the grounds and reasons for making the award.

Remarks as to the great expense of land arbitrations under the Municipal Act. *In re Christie and Toronto Junction*, 21.

2. *Auctioneer—License.*—Before the amending Act of 1894, 57 Vict. ch. 50, sec. 8 (O.), a municipal corporation could not, on the ground of the applicant's bad character, refuse to grant him an auctioneer's license.

Judgment of ROSE, J., 25 O. R. 256, affirmed. *Merritt v. City of Toronto*, 205.

3. *Damages—Ways.*—A municipal corporation is not responsible in

damages to a person who is injured in endeavouring to cross in daylight a plainly visible shallow trench, lawfully and necessarily in the street at the time, the person injured being, moreover, familiar with the locality and knowing that there is close at hand a safe passage way across the trench.

Judgment of the Queen's Bench Division reversed. *Keachie v. The Corporation of the City of Toronto*, 371.

4. *Drainage—Drainage Trials Act—55 Vict. ch. 42, secs. 583, 584, 598 (O.)—54 Vict. ch. 51, secs. 2, 3 (O.)—Jurisdiction of Referee.*—Where drainage works affecting several minor municipalities are constructed by the county, each minor municipality must keep in repair the part of the works within its own limits, and cannot call upon the other minor municipalities to contribute to the expense of repairs.

Per HAGARTY, C. J. O., and MACLENNAN, J. A. The drainage referee has jurisdiction to set aside a by-law of a minor municipality charging other minor municipalities with a portion of the expense of such repairs.

Per BURTON, and OSLER, J.J.A. The drainage referee has no jurisdiction. His jurisdiction depends upon that of the township. If they have exercised it wrongly or mistakenly he may review their action, but he cannot set aside a by-law which they had no power under any circumstances to pass.

In the result the referee's judgment, holding that he had jurisdiction and setting aside the by-law, was affirmed. *In re Township of Mersea and Township of Rochester*, 110—*In re Township of Gosfield North and Township of Rochester*, 110.

5. *Drainage—New Territory—Old Drain.*—Where a municipality makes alterations in and thus adopts as part of its own drainage system a drain existing in territory acquired from another municipality, it is liable for damages caused by subsequent neglect to keep the drain in repair.

Judgment of *BOYD, C.*, 25 O. R. 658, affirmed, *MACLENNAN, J.A.*, dissenting. *Fitzgerald v. City of Ottawa*, 297.

6. *Drainage—Contract—Ultra Vires—By-law—R. S. O. ch. 184, secs. 569, 573, 585.*—Where drainage works for the benefit of lands in two townships prove, as originally initiated and constructed, insufficient, an addition thereto costing more than \$200 must be authorized by petition and by-law under the Act, and a contract entered into under seal by one township binding itself to pay the cost of the additional work cannot, even after completion and acceptance of the work, be enforced.

Bernardin v. North Dufferin, 19 S. C. R. 581, considered.

Judgment of the Common Pleas Division, 25 O. R. 465, affirmed, *OSLER, J.A.*, dissenting. *Canadian Pacific R. W. Co. v. Township of Chatham*, 330.

7. *Local Improvements—By-law—Registration—R. S. O. ch. 184, secs. 351, 352, 612, 621.*—In constructing local improvements, a municipal corporation must either make an assessment of the probable cost, giving the ratepayers an opportunity of appealing and then, if necessary, make a further assessment to be confirmed by the Court of Revision in the same manner as the first, or they must defer the actual assessment until after the completion of the work, the ratepayers then

having the right to appeal. They cannot proceed partly in one way and partly in another without giving any opportunity of appealing from a definite assessment.

A municipal corporation, under the provisions of a general by-law respecting local improvements, determined to construct a sewer, and proceeded to assess the estimated cost on the property benefited. This assessment was confirmed by the Court of Revision. The council then passed a by-law authorizing the construction of the sewer to be proceeded with, and on its completion passed another by-law by which the actual cost, which was much greater than the amount of the assessment, was imposed and assessed upon the property. The council proceeded to enforce this assessment without having brought it before the Court of Revision:—

Held, that the assessment was invalid and could not be supported as a mere alteration of the estimated cost, or as a supplementary assessment.

The provisions of section 351 of the Municipal Act, R. S. O. ch. 184, are imperative and not merely directory, and if a local improvement by-law is not registered within two weeks after its final passing, a ratepayer may shew that it is invalid and successfully resist payment of the local improvement tax.

Re Farlinger and Morrisburgh, 16 O. R. 722, distinguished.

Judgment of *MACMAHON, J.*, reversed. *Sweeny v. The Corporation of Smiths Falls*, 429.

8. *Sewers—Damages—Act of God.*—Where a sewer, built and maintained by a municipal corporation, is free from structural defect and is of sufficient capacity to answer all

ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rain-fall, by water backing into the cellar of a person compelled by by-law to use the sewer for drainage purposes.

An extraordinary rain-fall may properly be treated as an act of God, in the technical meaning of that term, though it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence.

Judgment of the Queen's Bench Division reversed. *Garfield v. City of Toronto*, 128.

9. *Nuisance—By-law—Road Allowance—R. S. O. ch. 184, secs. 551, 552.*—Where a mill, erected with the permission of the township council, partly on an unused road allowance in the occupation of the Midland Railway Company, in lieu of which they had given another piece of land for a road, was afterwards pulled down by the orders of the council on the ground that the terms upon which its erection had been consented to had not been complied with, no by-law for its removal being passed, the owner was held entitled to damages. The pulling down of the building would, under the circumstances, if justifiable at all, be so only if authorized by by-law.

Judgment of the Chancery Division affirmed. *McNab v. Corporation of the Township of Dysart et al.*, 508.

NEGLIGENCE.

Railways—Volenti non fit Injuria.—Where a railway company sent an engine and crew to the yard of a lumber company, and, under the direction of servants of the lumber

company, cars of lumber were shunted from place to place by this engine and crew, the railway company were held liable in damages for the death of a servant of the lumber company, who was in a car counting lumber, caused by negligence in the management of the engine.

A finding by the jury that "the deceased voluntarily accepted the risks of shunting" was held to mean that he had accepted the ordinary risks and not risks arising from negligence.

Smith v. Baker, [1891] A. C. 325, applied.

Judgment of the Queen's Bench Division, 25 O. R. 209, affirmed. *Hurdman v. Canada Atlantic R. W. Co.*, 292.

See Church v. City of Ottawa, 348—ACCORD AND SATISFACTION—ACTION, 2—MASTER AND SERVANT, 1—RAILWAYS, 1.

NOTICE OF ACTION.

See Kelly v. Barton, 522.

NOVATION.

See PRINCIPAL AND SURETY.

NUISANCE.

See MUNICIPAL CORPORATIONS, 9.

OCCUPATION RENT.

See IMPROVEMENTS UNDER MISTAKE OF TITLE.

PARTNERSHIP.

Bills of Exchange and Promissory Notes—Endorser—Res Judicata—Practice—Judgment against Firm—Action thereon against Alleged Partner.—An action was brought against a firm in the firm name as makers and an individual as endorser of a note, and was dismissed as against the endorser on the ground that he had endorsed at the request of the holders for their accommodation, judgment being given against the firm :—

Held, reversing the judgment of STREET, J., 24 O. R. 497, that the dismissal of this action was an answer to an action on the judgment, in which it was sought to prove that the endorser was, as regards the plaintiffs, a partner by estoppel and therefore bound by the judgment against the firm.

The practice to be followed in proceeding against an alleged partner on a judgment against the firm, considered. *Ray et al. v. Isbister et al.*, 12.

PATENT OF INVENTION.

See Fowell v. Chown, 268.

PLANS AND SURVEYS.

Amendment of Plan—Ways—Closing Street—"Party Concerned"—52 Vict. ch. 20, sec. 7 (O.).—All persons who buy lots according to a registered plan do not *ipso facto* become "parties concerned" within the meaning of section 7 of the Land Titles Act, 52 Vict. ch. 20 (O.), in every street shewn upon it. Whether they are "concerned" or not in having a particular street kept open is a question of fact and in this case in

the absence of any representation at the time of the sale, by the vendor, that the street would be kept open, it was held that a person owning a lot several hundred yards away and on the other side of a highway from the street in question, could not object to its being closed.

Judgment of the Common Pleas Division affirmed. *In re McMurray and Jenkins*, 398.

PLEADING.

See DEFAMATION.

POLICE MAGISTRATE.

Justice of the Peace—Return of Convictions—Penalty—R. S. O. ch. 76, secs. 1 and 3—R. S. O. ch. 77, sec. 6.—A police magistrate, acting *ex officio* as justice of the peace, is not subject to the provisions of sec. 1 of R. S. O. ch. 76, and need not make a return as therein required to the clerk of the peace.

Section 6 of R. S. O. ch. 77 exempts him from this duty whether he is acting as police magistrate or *ex officio* as justice of the peace.

Judgment of the County Court of Leeds and Grenville affirmed. *Hunt qui tam v. Shaver*, 202.

See ARREST, 1.

PRACTICE.

See COUNTY COURT, 2—DEFAMATION—PARTNERSHIP.

PRINCIPAL AND AGENT.

Rival Employer—Clashing of Interests—Dismissal.—To act as agent for a rival insurance company is a breach of an insurance agent's agree-

ment "to fulfil conscientiously all the duties assigned to him and to act constantly for the best interests of (his employer)," and is sufficient justification for his dismissal.

Judgment of the Queen's Bench Division affirmed. *Eastmure v. Canada Accident Assurance Co*, 408.

See CONTRACT, 2.

PRINCIPAL AND SURETY.

Novation—Sale of Land—Varying Terms of Agreement—Release of Lots—Interest.—An agreement for sale and purchase of several lots, entered into between the plaintiffs and the defendant, described the lots by their plan number, and after providing for payment of the purchase money part in cash and part at times fixed therein with a right of prepayment contained the words: "Company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The defendant sold and assigned his interest in the agreement to a third person who made several payments to the plaintiffs, and sold several lots and parts of lots which were conveyed to the purchasers by the plaintiffs, who did not first insist upon payment of all interest, and who also on one occasion gave time to the third person for payment of interest:—

Held, 1. That there was no novation, the relations which the defendant himself created between the plaintiffs and the third person sufficiently accounting for the dealings between them.

2. That the proportion of the purchase price applicable to each lot was to be ascertained by dividing the

balance of purchase money, after deducting the cash payment, by the number of lots.

3. That the plaintiffs were not entitled to convey lots without requiring payment of all interest in arrear at the time of each conveyance, and interest to the date of the conveyance upon the portion of principal being paid.

4. That though the plaintiffs had no right to convey parts of lots, or to convey without requiring payment of interest, the defendant, even if merely a surety, was not wholly released by their doing this, and giving time for payment of interest, but was released as to interest in arrear when lots were conveyed and time was given, and was entitled to credit for the full proportion of purchase money of those lots of which parts had been conveyed.

Judgment of ROBERTSON, J., reversed. *The Land Security Company v. Wilson*, 151.

PROBATE.

See WILL, 2.

RAILWAYS.

1. *Railway Station—Negligence—Damages.*—A railway company is bound to provide for passengers safe means of ingress to and egress from its stations: and where a passenger arriving at a station at night walked along a platform not intended but frequently used as a means of exit but which was not in any way guarded, and after leaving the platform fell into an excavation in the company's grounds and was injured, the company was held liable in damages.

Judgment of the Queen's Bench Division affirmed. *Oldright v. Grand Trunk Railway Company of Canada*, 286.

2. *Highways—Cattle—“At Large”*—51 Vict. ch. 29, sec. 271 (D.)—*Non-suit—Jury.*]—Cattle are “at large” within the meaning of section 271 of 51 Vict. ch. 29 (D.) when the herdsman in following one of the herd which has strayed gets so far from the main body that he is unable to reach them in time to prevent their loitering or stopping on the highway at its intersection with a railway when he sees a train approaching.

The question whether cattle are at large or not need not under all circumstances be submitted to the jury. It is for the Judge in that case as in others to say whether there is any evidence for the jury that the cattle were in charge within the meaning of the Act.

Judgment of the County Court of Wentworth affirmed. *Thompson v. Grand Trunk Railway Company of Canada*, 453.

See NEGLIGENCE — WATER AND WATERCOURSES, 2.

REASONABLE AND PROBABLE CAUSE.

See ARREST, 2.

REGISTRY ACT.

See MORTGAGE, 1.

RELEASE.

See BANKRUPTCY AND INSOLVENCY, 1, 2, 3—PRINCIPAL AND SURETY.

REMOVAL OF ACTION.

See COUNTY COURT, 2.

SALE OF GOODS.

See CONTRACT.

SALE OF LAND.

Description—“More or Less”—Specific Performance.]—Where a city building lot was described in an agreement for exchange as having a depth of “130 feet more or less,” and had in fact a depth of only 117 feet with a lane in rear 12 feet wide, specific performance at the suit of the owner was under the particular circumstances refused. Judgment of BOYD, C., affirmed. *Moorhouse v. Hewish*, 172.

See PRINCIPAL AND SURETY.

SEWERS.

See MUNICIPAL CORPORATIONS, 8.

SPECIFIC PERFORMANCE.

See SALE OF LAND.

STATUTES.

R. S. C. ch. 174, sec. 62.]—See ARREST.

R. S. O. ch. 64, sec. 2.]—See EXECUTION.

R. S. O. ch. 73.]—See *Kelly v. Barton*, 522.

R. S. O. ch. 76, sec. 1.]—See POLICE MAGISTRATE.

R. S. O. ch. 76, sec. 3.]—See POLICE MAGISTRATE.

R. S. O. ch. 77, sec. 6.]-See POLICE MAGISTRATE.

R. S. O. ch. 100, sec. 30.]-See IMPROVEMENTS UNDER MISTAKE OF TITLE.

R. S. O. ch. 110, sec. 37.]-See EXECUTORS AND ADMINISTRATORS.

R. S. O. ch. 114, sec. 44.]-See MORTGAGE, 1.

R. S. O. ch. 114, sec. 45.]-See MORTGAGE, 1.

R. S. O. ch. 114, sec. 80.]-See MORTGAGE, 1.

R. S. O. ch. 119.]-See WATER AND WATERCOURSES, 1.

R. S. O. ch. 124, sec. 7.]-See BANKRUPTCY AND INSOLVENCY, 1, 2.

R. S. O. ch. 157, sec. 68.]-See COMPANY.

R. S. O. ch. 167, sec. 114, sub-sec. 19.]-See INSURANCE, 1.

R. S. O. ch. 184, sec. 351.]-See MUNICIPAL CORPORATIONS, 7.

R. S. O. ch. 184, sec. 352.]-See MUNICIPAL CORPORATIONS, 7.

R. S. O. ch. 184, sec. 551.]-See MUNICIPAL CORPORATIONS, 9.

R. S. O. ch. 184, sec. 552.]-See MUNICIPAL CORPORATIONS, 9.

R. S. O. ch. 184, sec. 569.]-See MUNICIPAL CORPORATIONS, 6.

R. S. O. ch. 184, sec. 573.]-See MUNICIPAL CORPORATIONS, 6.

R. S. O. ch. 184, sec. 585.]-See MUNICIPAL CORPORATIONS, 6.

R. S. O. ch. 184, sec. 612.]-See MUNICIPAL CORPORATIONS, 7.

R. S. O. ch. 184, sec. 621.]-See MUNICIPAL CORPORATIONS, 7.

R. S. O. ch. 234.]-See DURESS.

51 Vict. ch. 29, sec. 271 (D.).]-See RAILWAYS, 2.

51 Vict. ch. 9 (O.).]-See WILL, 2.

52 Vict. ch. 20, sec. 7 (O.).]-See PLANS AND SURVEYS.

53 Vict. ch. 33, sec. 56 (D.).]-See BILLS OF EXCHANGE.

53 Vict. ch. 33, sec. 88 (D.).]-See BILLS OF EXCHANGE.

54 Vict. ch. 14 (O.).]-See COUNTY COURT, 2.

54 Vict. ch. 51, sec. 2.]-See MUNICIPAL CORPORATIONS, 4.

54 Vict. ch. 51, sec. 3.]-See MUNICIPAL CORPORATIONS, 4.

55 Vict. ch. 26, sec. 4 (O.).]-See BILLS OF SALE AND CHATTEL MORTGAGES.

55 Vict. ch. 30, sec. 3 (O.).]-See MASTER AND SERVANT, 2.

55 Vict. ch. 30, sec. 6, sub-sec. 3 (O.).]-See MASTER AND SERVANT, 2.

55 Vict. ch. 42, sec. 401 (O.).]-See MUNICIPAL CORPORATIONS, 1.

55 Vict. ch. 42, sec. 404 (O.).]-See MUNICIPAL CORPORATIONS, 1.

55 Vict. ch. 42, sec. 583 (O.).]-See MUNICIPAL CORPORATIONS, 4.

55 Vict. ch. 42, sec. 584 (O.).]-See MUNICIPAL CORPORATIONS, 4.

55 Vict. ch. 42, sec. 598 (O.).]-See MUNICIPAL CORPORATIONS, 4.

57 Vict. ch. 50, sec. 8 (O.).]-See MUNICIPAL CORPORATIONS, 2.

SURRENDER.

See LANDLORD AND TENANT.

SURROGATE COURT.

See WILL, 2.

TRESPASS.

See ARREST, 1.

TRIAL.

See *Church v. City of Ottawa*,
348—ACCORD AND SATISFACTION—
EVIDENCE—NEGLIGENCE.

TRUSTS AND TRUSTEES.

See EXECUTORS AND ADMINISTRATORS.

TURKEY.

See ACTION, 2.

WAGES.

See COMPANY.

WATER AND WATERCOURSES.

1. *Water Privileges*—"Occupied Mill Privilege"—*R. S. O. ch. 119.*]—There can be no interference whatever, under the Act respecting Water Privileges, *R. S. O. ch. 119*, with an occupied mill privilege, even though the authorized works would not affect the mode in which the occupied mill privilege has, up to the time of the application, been used.

An order made under the Act must state specifically the height of the authorized dam.

Order of the County Judge of Peterborough set aside. *In re Burnham et al.*, 40.

2. *Surface Water*—*Diversion of Watercourse*—*Railways*—*Arbitration and Award*—*Damages*—*In-*

junction—*Continuing Damage.*]—If water precipitated from the clouds in the form of rain or snow forms for itself a visible course or channel and is of sufficient volume to be serviceable to the persons through, or along, whose lands it flows, it is a watercourse, and for its diversion an action will lie.

Beer v. Stroud, 19 O. R. 10, considered.

Where such a watercourse has been diverted by a railway company in constructing their line without filing maps or giving notice the landowner injuriously affected has a right of action and is not limited to an arbitration.

For such diversion the landowner, in the absence of an undertaking by the company to restore the watercourse to its original condition, is entitled to have the damages assessed as for a permanent injury.

The mode of computing damages to be allowed in lieu of an injunction, considered.

Judgment of the Queen's Bench Division, 25 O. R. 37, affirmed. *Arthur v. Grand Trunk Railway Company of Canada*, 89.

See MUNICIPAL CORPORATIONS, 8.

WAYS.

See ACTION, 2—MUNICIPAL CORPORATIONS, 3, 9—PLANS AND SURVEYS—RAILWAYS, 2.

WILL.

1. *Construction* — *Inconsistent Clauses.*]—A testator by the third clause of his will, made in numbered clauses, devised a lot to his son F., and by the fourth clause he ap-

pointed executors and devised another lot to them to be disposed of by them for the benefit of named sons and daughters in certain shares and amounts. In this clause there was the following paragraph: "At the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors":—

Held, reversing the judgment of the Chancery Division, 25 O. R. 635 (STREET, J., dissenting), that this paragraph did not apply to or modify the devise to F. in the third clause. *Crawford v. Broddy*, 307.

2. *Probate—Ancillary Probate—Surrogate Court—51 Vict. ch. 9 (O.)*.—A will executed by a person when domiciled in the Province of Quebec before two notaries there, in accordance with the law of that Province, not acted upon or proved in any way before any Court there, is not within the Act respecting Ancillary Probates and Letters of Administration, 51 Vict. ch. 9 (O.).

Judgment of the Surrogate Court of Bruce affirmed. *In re Maclaren*, 18.

WITNESS.

See ARREST, 1—MORTGAGE, 1—MUNICIPAL CORPORATIONS, 1.

WORDS.

"Apprentices."—See COMPANY.

"At Large."—See RAILWAYS, 2.

"Buildings."—See COVENANT.

"Earth-filling."—See COVENANT.

"Erections."—See COVENANT.

"Labourers."—See COMPANY.

"More or Less."—See SALE OF LAND.

"Occupied Mill Privilege."—See WATER AND WATERCOURSES, 1.

"Party Concerned."—See PLANS AND SURVEYS.

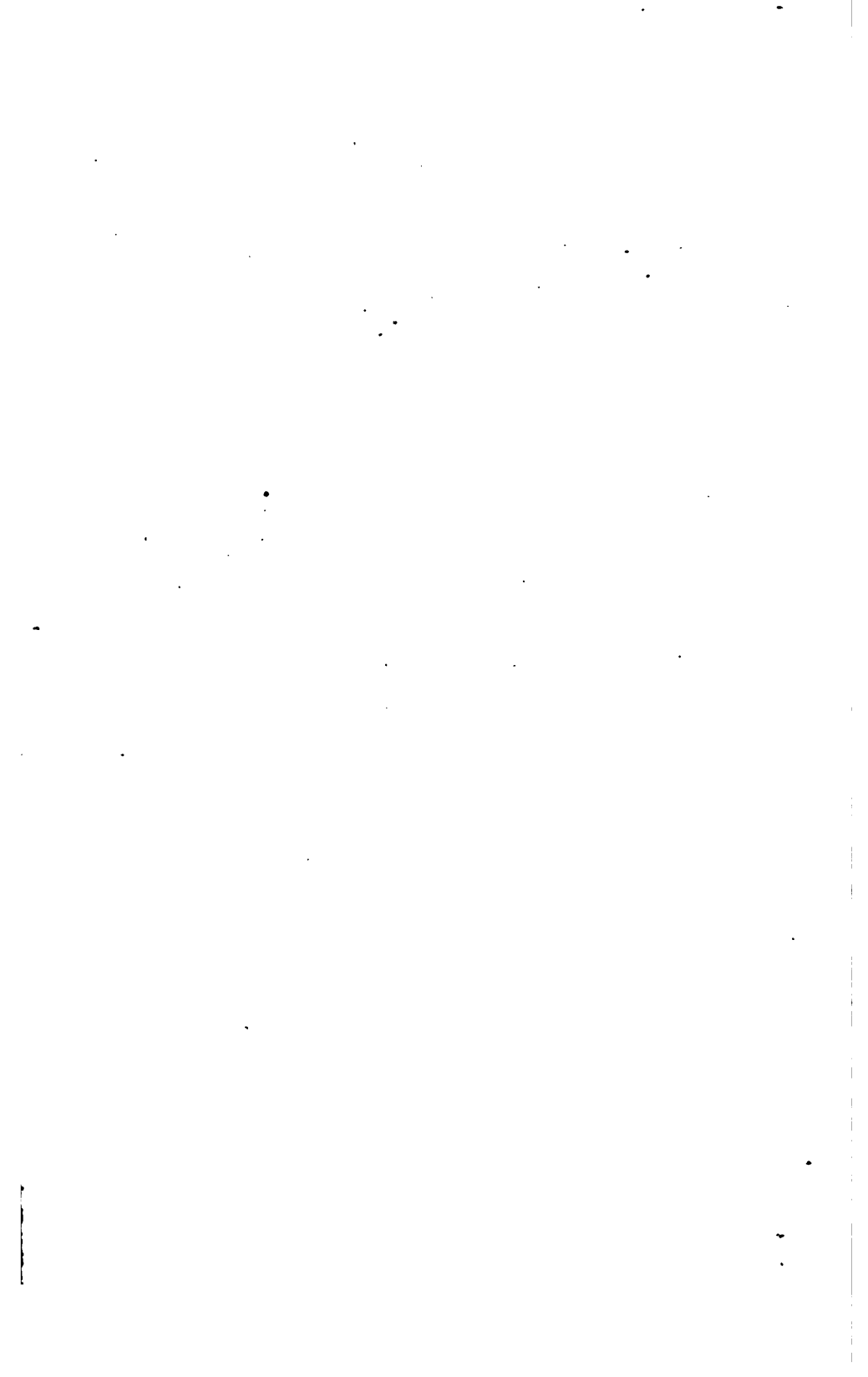
"Servants."—See COMPANY.

WORK AND LABOUR.

See CONTRACT, 1.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT.



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